Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ADELE SCHENBERG, RORY RIDDLER,
DOROTHY LIGHT and JUANITA BRIGGS,
Petitioners,

vs.

CHRISTOPHER S. (KIT) BOND,
Individually and as Governor of the State of Missouri

and

RAY S. JAMES,
Individually and as Director of the Department
of Revenue of the State of Missouri,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether fee agents appointed by the Director of Revenue of the State of Missouri, pursuant to § 136.055 of the Revised Statutes of Missouri, may be dismissed from their positions because they belong to a different political party from that of the newly elected Governor and his Director of Revenue.

A. Whether the doctrine of *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), protects or should be extended to protect such fee agents against partisan political dismissal in violation of their rights guaranteed by the First and Fourteenth Amendments.

B. Whether respondents sustained their burden of demonstrating that party affiliation is an appropriate requirement for the effective performance of the public offices of 158 fee agents throughout the State of Missouri.

LIST OF ALL PARTIES

Petitioner Adele Schenberg was a plaintiff in the District Court and an appellant in the Court of Appeals. Petitioners Rory Riddler, Dorothy Light and Juanita Briggs were intervenors in the District Court, on the side of plaintiffs, and were appellants in the Court of Appeals. (Charles E. Sweeney was also a plaintiff and appellant, but does not desire to be a petitioner in this Court because of a change in his business activities.)

Respondent Christopher S. (Kit) Bond is presently Governor of the State of Missouri. Respondent Ray S. James is the Director of the Department of Revenue of the State of Missouri, appointed by Governor Bond. They were defendants in the District Court and appellees in the Court of Appeals.

Petitioners, all Democrats, were appointed as agents of the Department of Revenue by the Democratic predecessor of respondent James. Respondents are Republicans.

Ernestine Beckman and Gerard J. Schmidt were named as defendants in the District Court, but although served, they did not appear at the trial. They sought to participate after the entry of the District Court's judgment and just before the District Court issued an injunction pending appeal. Mrs. Beckman and Mr. Schmidt filed a separate appeal in the Court of Appeals. They are Republicans and were appointed by Mr. James as successors to Mr. Sweeney and Mrs. Schenberg, respectively.

Denise Funderburk, Ellie O'Donnell and Terry Cole, all Republicans, were appointed by Mr. James as successors to Mr. Riddler, Mrs. Light and Mrs. Briggs, respectively. They sought but were denied leave to intervene in the District Court after judgment, and they filed a separate appeal to the Court of Appeals.

Bert Stewart and Mary Jane Joos were Democratic agents who filed separate suits in the District Court seeking relief similar to that sought by petitioners. (They were not represented by counsel for petitioners herein.) Delores Cook and William Otto Haag, Jr. were the Republican successors to Mr. Stewart and Ms. Joos. The separate appeals of these other parties were consolidated in the Court of Appeals.

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OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on January 13, 1982, in an opinion reported in *Sweeney* v. *Bond,* 669 F. 2d 542 (8th Cir. 1982). The opinion is reproduced as Appendix A hereto. (The panel of the Court of Appeals consisted of Circuit Judges Ross and Stephenson and District Judge Howard of the Western District of Arkansas, sitting by designation.)

On February 4, 1982, the Court of Appeals entered an order denying petitioners' petition for rehearing and suggestions for

rehearing en banc. (See Appendix B.) No opinion was written and the order has not been officially reported.

The District Court (the Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri) entered Findings of Fact, Conclusions of Law and Judgment on May 19, 1981, which together with an Order entered on July 2, 1981, overruling post-trial motions but granting an injunction pending appeal, is reported in *Sweeney* v. *Bond,* 519 F. Supp. 124 (E.D. Mo. 1981). Judge Cahill's Findings, Conclusions and Judgment are reproduced as Appendix D hereto, and his post-judgment opinion of July 2, 1981 is reproduced as Appendix E hereto.

Judge Cahill had previously filed a Memorandum and Order on April 14, 1981, concerning petitioners' attempts to take the deposition of Governor Bond. This Order has not been officially reported and is reproduced as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 13, 1982. (See Appendix A and F.) Petitioners filed a timely petition for rehearing and suggestion of appropriateness of rehearing en banc, which was denied on February 4, 1982. (See Appendix B.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves an interpretation of the First and Fourteenth Amendments to the Constitution of the United States, the text of which is set out in Appendix G.

Petitioners complaint was filed pursuant to Title 42, United States Code § 1983, the text of which is set out in Appendix H.

Petitioners served as agents appointed by the Director of the Department of Revenue of the State of Missouri, under authority of §136.055, Revised Statutes of Missouri, the text of which is set out in Appendix I.

STATEMENT OF THE CASE

In 1976, the Honorable Joseph Teasdale, a Democrat, was elected Governor of the State of Missouri, having defeated the Republican incumbent, the Honorable Christopher S. (Kit) Bond, a respondent herein. After Governor Teasdale's inauguration in January, 1977, various individuals, including petitioners, were appointed agents of the Department of Revenue by the then acting Director of Revenue of the State of Missouri, pursuant to § 136.055 of the Revised Statutes of Missouri. (See Appendix I.) Such agents, being paid for each transaction, are commonly referred to as "fee agents".[1] There are 158 appointed fee agents in the state, each being assigned a particular location in which his or her fee agency office could be located. Petitioners were all active members of the Democratic Party.

In November, 1980, Governors Teasdale and Bond again opposed each other for the governorship, and this time Governor Bond won. In January, 1981, he assumed office and shortly thereafter appointed respondent James, also a Republican, as his Director of Revenue. The new Bond administration then undertook the replacement of various fee agents, including petitioners, by active members of the Republican Party. (Within a few months, 89 Democratic fee agents were terminated—see *Joseph* v. *Bond,* 522 F. Supp. 1363, 1366 (W.D. Mo. 1981), reversed on April 20, 1982 by Court of Appeals, Nos. 81-2332 and 81-2386.)

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[1] The agents appointed pursuant to paragraph 2 of § 136.055 are referred to as "branch managers". See *Gibbons* v. *Bond,* 668 F. 2d 967 (8th Cir. 1982), affirming *Gibbons* v. *Bond,* 523 F. Supp. 843 (W.D. Mo. 1981).

Having received notices of dismissal, Charles E. Sweeney[2] and petitioner Adele Schenberg, on March 9, 1981, filed a complaint in the United States District Court for the Eastern District of Missouri, against Governor Bond and Mr. James, seeking to prohibit their dismissal from their positions as fee agents. The complaint was filed under 42 U.S.C. § 1983. Also joined as defendants were Ernestine Beckman and Gerard J. Schmidt who had been designated by Mr. James as successors to Mr. Sweeney and Mrs. Schenberg, respectively. Although duly served with a summons in this case, Mrs. Beckman and Mr. Schmidt did not appear during any of the proceedings prior to judgment and did not participate in the pre-trial or trial proceedings.

No formal temporary restraining order or preliminary injunction was issued, but pending final hearing of the case by the District Court, respondents Bond and James agreed on March 11, 1981, not to enforce the dismissal of the plaintiffs or of petitioner Rory Riddler who indicated an intention to intervene at that time. Prior to trial, petitioner Juanita Briggs also received a notice of dismissal; petitioner Dorothy Light had not yet received such a notice prior to trial, but it was a foregone conclusion that, but for this lawsuit, she would have been dismissed within a short time (Tr. 108). Mr. Riddler, Mrs. Briggs and Mrs. Light were permitted to intervene at the start of the trial on April 16, 1981 (Tr. 108); Mrs. Light and Mrs. Briggs were also protected from dismissal, pending the outcome of the litigation, by informal agreement among the parties.

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[2] Mr. Sweeney participated in the proceedings in the District Court and the Court of Appeals, and he operated his fee agency office until removed on February 18, 1982, when an injunction pending appeal was dissolved. Because of a change in his business activities, he does not desire to be reinstated at this time, and he has therefore not joined herein as a petitioner. However, the word "petitioners", to the extent that it refers to proceedings in the Courts below, includes Mr. Sweeney.

Discovery was expedited because of the nature of the case. Trial was also expedited, and it was heard on April 16, and 17, 1981, by the Honorable Clyde S. Cahill, United States District Judge, sitting without a jury.

At the trial, both sides offered evidence. Petitioners' evidence consisted primarily of the testimony of each of the five of them, together with excerpts from the depositions of respondent James and two of the Governor's assistants, David Broeker and James Cumbee. In addition, numerous documents, most of which were obtained by petitioners from Department of Revenue and the Governor's files, were offered in evidence, primarily for the purpose of showing the great degree of control exercised by the Governor and the Director of Revenue over the establishment and operation of fee agents' offices.[3]

Defendants' evidence related to the general operation of fee agent offices. The testimony of respondent James attempted to justify the use of politics and party affiliation in the appointment of fee agents. In addition, Larry Thaier, Bureau Manager for the Field Services Bureau of the Department of Revenue, testified in an apparent effort to create an issue as to the

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[3] In addition to documents referred to in the transcript as Plaintiffs' or Defendants' Exhibits, a number of documents were referred to in depositions and the transcript as Plaintiffs' Deposition Exhibits. Also there are references in the transcript to some of 44 documents obtained from respondents' files. See plaintiffs' memorandum of April 13, 1981, with sealed exhibits and the District Court's memorandum and order dated April 14, 1981. Many of these 44 documents were ordered to be submitted *in camera* to the District Court, so as to avoid public disclosure of documents which might contain material which could be politically embarrassing to the Governor or should be considered confidential. The secrecy of these documents was continued by the District Court during the trial, thus accounting for cryptic references by counsel to such persons as Representative R, or Senators F or M, or Senator from S, Mr. F, Mrs. F, or the G, H, or P offices (Tr. 113, 330, 405-406, 412, 415-416, 534). Ultimately, the District Court considered the best approach to be the admission of all such documents (Tr. 543).

dismissal of Mr. Sweeney for cause. Mr. James also tried to raise issues for cause as to the dismissals of Mr. Riddler and Mrs. Briggs.[4]

The testimony and other evidence related to several different subjects. Petitioners testified generally as to their appointments and terminations. Both sides produced evidence as to the general operation of a fee agent office, and petitioners offered additional evidence, particularly the deposition excerpts and documents obtained from respondents' files, as to the relationship between the fee agents offices and the Department of Revenue and also as to the control exercised over such offices by the Governor and Director of Revenue. Respondents offered evidence (primarily the testimony of Mr. James) as to his belief in the availability of political considerations as a reason for replacement of petitioners.

Appointment and Termination

Shortly after his election in 1976, Governor Teasdale appointed Dr. James T. LePage as Director of Revenue. Dr. LePage in turn appointed petitioners Schenberg, Riddler, Briggs, Light and Sweeney to be fee agents for offices located in Creve Coeur, St. Charles, Sikeston, Rolla and Moline Acres, Missouri, respectively (Tr. 126-128, 181, 209, 233-234, 250). All of these appointees were affiliated with the Democratic Party (Tr. 125, 162, 180, 209, 233, 249), and all, except Dorothy Light (Tr. 241), had financially supported or actively participated in

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[4] The District Court did not find cause for dismissal of any petitioner. See Conclusion of Law No. 9, *Sweeney* v. *Bond*, 519 F. Supp. 124, 130 (E.D. Mo. 1981). The Court of Appeals, recognizing that the District Court held that "partisan political affiliation played a substantial role in all of the dismissals", did not otherwise comment on any suggestion of cause and noted that "on appeal defendants do not dispute the political motivation of the dismissals." *Sweeney* v. *Bond*, 669 F. 2d 542, 544 at fn. 5 (8th Cir. 1982).

the election of Governor Teasdale in 1976 (Tr. 126, 180, 211, 263). All of the petitioners, except Mrs. Briggs (Tr. 211), were active in the unsuccessful 1980 re-election campaign of Governor Teasdale and contributed either financial support or campaign effort (Tr. 126, 165-166, 199-200, 241, 264).

Several petitioners testified that, after they began the operation of their offices, they believed that they could not be removed as fee agents because of their political affiliations. Mrs. Schenberg testified that her husband was a lawyer (Tr. 178) and she was aware of the *Elrod* decision, prohibiting dismissal for political reasons, which she felt applied to her (Tr. 178). Mr. Riddler felt that he was secure in his position because of Governor Bond's numerous campaign statements that "he was no longer interested in continuing the patronage system in the State" (Tr. 201, 207). Mrs. Briggs testified that she relied on a District Court decision during the Teasdale administration which had ordered reinstatement of vision testers and other people associated with the Department of Revenue who had been dismissed by Governor Teasdale for political reasons (Tr. 226, 232).

After the election of Governor Bond in November, 1980, and the appointment of respondent James as Director of Revenue in January, 1981 (Tr. 277), all of the petitioners, except Mrs. Light (Tr. 247), received a letter from Mr. James terminating their fee agencies (Tr. 150, 189-190, 210, 254; Pltff. Exhs. 3, 14, 18). Prior to receipt of the termination notices, none had been interviewed by any representative of the current Department of Revenue for the positions of fee agent (Tr. 147, 189, 211, 253), and petitioners wanted to continue in their offices (Tr. 235, 253). The persons who were designated as successors for Sweeney, Schenberg and Briggs[3] were all Republicans (Tr. 149,

[3] At trial time, no successors had been named for Mr. Riddler and Mrs. Light; their successors became known when they sought to intervene in the case after judgment.

212, 254, 284-285), and were on a list coming from Mr. Cumbee, Administrative Assistant to Governor Bond (Tr. 302-303, 317, 360-361); Mr. Cumbee discussed his recommendations with the Governor, who did not object to them (Tr. 360).

Respondent James further testified that all of the persons suggested to him by the Governor's staff were appointed as fee agents (Tr. 304), and that he was very interested in the suggestions of the Governor as to prospective appointees; such suggestions would "carry great, great weight" (Tr. 314, 315, 523). Mr. Cumbee testified that Mr. James never acted contrary to a recommendation concerning fee agent appointments which came from the Governor's staff (Tr. 320).

Mr. James acknowledged that he was accurately quoted in a newspaper when he said that "qualified Republicans who are supportive of the present administration" will be sought in most cases for the position of fee agent (Tr. 291-292).

Operation of Office

After their respective appointments as fee agents by written letters of appointment, petitioners received instructions from the Director of Revenue concerning bank procedures in the collection of State funds (Tr. 134, 184, 211, 238, 251). With the exception of Mrs. Schenberg, petitioners attended a one-week seminar conducted by the Missouri State Highway Patrol in the capital at Jefferson City (Tr. 182, 213, 236, 253). In addition, the agents received additional field supervision from field representatives employed by the Department of Revenue (Tr. 146). Fee agents hire employees to assist them in their office or to conduct the operation of the office (Tr. 154, 194, 211, 242, 248), and the fee agents and many of their employees attend numerous seminars held by the Department of Revenue (Tr. 144-145, 188, 236, 253).

Fee offices collect revenue for the State of Missouri in the form of sales taxes, license renewals, drivers license renewals, and marine registrations (Tr. 133). All of the paperwork and documentation for these transactions and collections are on behalf of the Department of Revenue (Tr. 133, 135). Agents establish four bank accounts for the State for collections on motor vehicles, city sales tax, drivers licenses, and marine transactions (Tr. 133-135, 184). Their fees of $1.00 for each transaction are deposited in a separate bank account (Tr. 135).

Fee agents have "vision testers" who conduct eye examinations for drivers licenses on the premises rented and occupied by the fee agent (Tr. 136, 187, 216), but vision testers are paid by the Department of Revenue for the space occupied by the vision testers (Tr. 187, 216). Mrs. Briggs testified that she established the hours of the vision testers (Tr. 216).

The compensation of fee agents is derived from the $1.00 fee authorized by the statute (§ 136.055), out of which the fee agent must pay such expenses as rent, salaries of employees, and other operational expenses (Tr. 137). The evidence indicated the following gross and net income of petitioners from their fee agencies for the year 1980:

Name	Gross Income	Net Income	(Tr.)
Schenberg	$ 78,500	$ 39,000	137,275;153
Riddler	$135,000	$25,000/26,000	193
Briggs	$ 39,000	$15,000/20,000	219;220
Light	$ 49,000	$ 34,000	241/242
Sweeney	$120,000/130,000	$ 23,000	257

The Court of Appeals stated (669 F. 2d at 546) that "in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri."

Fee agents receive a manual of State statutes, an Operational Procedures Manual, and many procedural instructions and communications from the Department of Revenue, all governing the operation of the office (Tr. 138, 187, 215, 236, 253; Pltffs. Exhs. 5, 6, 7). The Operational Procedures Manual (Exh. 6) consisted of numerous changes in procedures that were effectuated by the Director of Revenue and sent to branch offices as well as fee offices (Tr. 140-141).[6] The manuals provided by the Department of Revenue are used by fee agents to educate themselves as to procedures, to show to customers who may have questions, and as a general guideline for operation of the office (Tr. 143). Informational memoranda (Exh. 7) show a high degree of control by the Department of Revenue over fee agent procedures and operations (Tr. 481).

Fee agents have access to information from the Department of Revenue over a WATS line at the office of the Department in the state capital (Tr. 146). Fee offices have their own telephones in their offices, but they are listed in the telephone book in the name of the Department of Revenue (Tr. 146, 214, 237).

The hours during which fee agents remain open to the public are submitted by the agents to the Department of Revenue for approval (Tr. 146, 260). Vacations and holidays must be

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[6] Section 136.055(2) recognizes that in certain areas of the State, the Department of Revenue maintains an office generally referred to as a branch office. The manager and other employees of such branch offices are paid by the State, and such offices do not charge the $1.00 fee which fee agents are authorized by the statute to charge (Tr. 140-141).

When a number of Democratic branch agents were dismissed by Mr. James for political reasons, they filed a suit, similar to the instant case, in the District Court for the Western District of Missouri, and were ordered restored to their positions and given protection against such political terminations in *Gibbons* v. *Bond*, 523 F. Supp. 843 (W.D. Mo. 1981). The decision was affirmed by the same panel of the Court of Appeals which decided the instant case. See *Gibbons* v. *Bond*, 668 F. 2d 967 (8th Cir. 1982).

reported to the Department of Revenue (Tr. 147), and agents must have their locations approved (Tr. 170). Equipment such as typewriters, adding machines, safes and other miscellaneous supplies are furnished by the agent (Tr. 172).

Respondents offered evidence that in 1953 the Missouri Attorney General issued an opinion that fee agents were not state employees (Tr. 450; Defts. Exh. 2), and that the Social Security Administration had determined that fee agents were not considered employees covered by the Social Security program (Tr. 451-454; Defts, Exhs, 3, 4). There was no evidence that any petitioner had been involved in either of these determinations. The District Court admitted this evidence, over petitioners' objections, for "informative" rather than "precedential" value (Tr. 451-454).

Respondent James testified that income taxes are not withheld from fee agents, the Department of Revenue makes no Social Security contributions for fee agents, they are not members of the State Retirement System, and he does not submit the names of fee agents for inclusion in the Official State Manual (Tr. 520-521). Mr. James did not think he was creating an employment relationship as to new agents whom he had appointed (Tr. 521).

Although fee agents are responsible for any dishonored or unpaid checks which they receive, state officers cooperate in efforts to collect; the State Highway Patrol will issue a police demand order to pick up license plates from persons who have issued insufficient funds checks (Tr. 185, 493). Fee agents absorb the loss for all funds received on behalf of the Department of Revenue if the checks are not paid (Tr. 186-187).

Relationship to and control by Director of Revenue and Governor

In addition to the control exercised by the Department of Revenue, as previously indicated, through seminars, training,

field manuals, field supervision, location, hours, etc., the evidence indicated considerable additional control by the Director of Revenue and the Office of the Governor. This control was particularly reflected in representative documents in evidence obtained from the files of the Director of Revenue and the Governor's Office. Such control was also apparent in the recommendations from the Governor's Office as to the fee agents appointed by respondent James.

These documents indicated that the Governor's Office decided between two or more Republicans competing for appointment to the same fee agency; in some instances the problem was resolved by appointing one person as fee agent and designating his opponent as a manager, deputy or employee of the office (Tr. 335, 345, 536-537). The Governor's Office has also determined locations for offices and designated banks to be used (Tr. 337-338; Depos. Exh. 18); they discussed the use of fee agent appointments for purposes of securing action from State legislators (Tr. 346). The Governor suggested that a person who furnished an airplane to him should be reconsidered for a fee agency (Tr. 546-547; *in camera* Doc. 36). The Governor's Office also considered the appointment of fee agents from among persons who would agree to contribute funds to the Republican Party (Tr. 347, 539, 542; Depos. Exh. 4).

Politics as a factor

In his testimony at trial, respondent James suggested the propriety of political affiliation as a consideration for appointment of fee agents (Tr. 514). Although cross-examination was restricted by the Court (Tr. 546), Mr. James testified as to his belief that fee agents are representatives of the Governor in their dealings with the general public, and that the Governor was therefore entitled to appoint persons from his own political party (Tr. 534). Mr. James testified that he considered loyalty to the present Republican administration as a strong factor in deter-

mining whom to appoint as a successor agent (Tr. 514). Mr. James' motive was to terminate petitioners because they were Democrats and to replace them with Republicans (Tr. 284-285).

* * * * *

After the trial was concluded on April 17, 1981, the parties submitted post-trial briefs, and the District Court, on May 19, 1981, entered Findings of Fact, Conclusions of Law and a Judgment which denied any relief to plaintiffs and dismissed the complaint with prejudice. See *Sweeney* v. *Bond,* 519 F. Supp. 124 (E.D. Mo. 1981) — Appendix D. On May 21, 1981, petitioners filed their post-trial motion seeking to change the Court's decision or to grant a new trial; they also sought a stay of execution of the judgment pending disposition of that motion and further requested an injunction pending appeal. On May 22, 1981, the Court entered an order temporarily staying the judgment of May 19 pending disposition of the post-trial motion.

The motion for injunction pending appeal apparently precipitated some interest in the successors appointed to the offices by Mr. James, for on June 9, 1981 (three days before the motion for injunction pending appeal was set for hearing) defendants Schmidt and Beckman appeared by counsel to oppose the injunction pending appeal.[7] On June 11, 1981, Denise Funderburk, Ellie O'Donnell and Terry Cole sought to intervene on the defendants' side of the case, they being Mr. James' designees as successors to Mr. Riddler, Mrs. Light and Mrs. Briggs, respectively. All five of these successors were represented by the same counsel.

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[7] Although served with process and the complaint when the suit was filed, these defendants filed no pleadings and did not appear at the trial

After briefs were submitted to the District Court on the issues of intervention and injunction pending appeal, the Court of July 2, 1981, entered final orders making the judgment appealable. The Court denied petitioners' motion for new trial or to alter or amend the judgment. The Court also denied the application of Funderburk, O'Donnell and Cole to intervene. Finally, the Court entered an order granting an injunction to petitioners pending appeal. See Appendix E and *Sweeney* v. *Bond,* 519 F. Supp. 124, 131-133 (E.D. Mo. 1981).

Petitioners duly filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit, together with the bond required by the District Court. Thereafter, defendants Beckman and Schmidt and the applicants for intervention Funderburk, O'Donnell and Cole filed separate notices of appeal. The three separate appeals were consolidated with each other and with appeals filed by two other fee agents who had filed similar suits in the District Court after the instant suit was filed by petitioners.[8]

On January 13, 1982, the Court of Appeals issued an opinion affirming the judgment of the District Court, holding that petitioners were not employees of the State of Missouri and therefore were not protected from dismissal because of their political affiliations by *Elrod* v. *Burns,* 427 U.S. 347 (1976), and

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[8] In their complaint, petitioners herein sought class action certification of this case as to all 158 fee agents in Missouri. The certification was refused on April 16, 1981, and the class action issue was not raised on appeal.

It should be further noted that in addition to the suits filed in the Eastern District of Missouri, there were several suits filed in the Western District of Missouri by fee agents. District Judge John W. Oliver refused to follow the decision of Judge Cahill herein and granted equitable and other relief to the fee agents in *Joseph* v. *Bond,* 522 F. Supp. 1363 (W.D. Mo. 1981). His judgment was reversed on April 20, 1982, by the Court of Appeals in Nos. 81-2332 and 81-2386 on the basis of the decision herein. (Counsel for Joseph et al. have indicated that a petition for certiorari is contemplated.)

Branti v. *Finkel,* 445 U.S. 507 (1980); the Court of Appeals declined to extend *Elrod* and *Branti* to cases not involving public employees. The Court of Appeals further held that political affiliation is an appropriate requirement for the effective performance of fee agents. The opinion of the Court of Appeals is reproduced as Appendix A to this petition, and is reported as *Sweeney* v. *Bond,* 669 F. 2d 542 (8th Cir. 1982).

Petitioners filed a timely petition for rehearing with a suggestion of appropriateness of rehearing en banc. The petition for rehearing was denied without opinion on February 4, 1982 — See Appendix B.[9]

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming the judgment of the District Court which denied injunctive and other relief to petitioners.[10]

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[9] After the denial of the petition for rehearing, petitioners filed a motion in the Court of Appeals seeking a stay of the mandate, pending determination of the instant petition for writ of certiorari; the motion for stay of mandate was denied on February 16, 1982, without opinion. On February 17, 1982, petitioners mailed an application to this Court for stay of the judgment of the Court of Appeals, or in the alternative for injunction, but in the meantime, the mandate of the Court of Appeals was sent to the District Court, and on February 18, 1982, the District Court dissolved the injunction pending appeal which had been issued on July 2, 1981. Within a few hours thereafter, petitioners were removed by respondent James from their positions as fee agents. On March 2, 1982, this Court (Justice Blackmun) denied the application for the stay. (See No. A-726.)

[10] If successful herein, petitioners could be reinstated to their positions as fee agents as quickly as they were removed on February 18, 1982.

ARGUMENT

Introduction

The immediate issue presented by this petition is whether petitioners, having been appointed as fee agents pursuant to statutory authority (§ 136.055, Mo.Rev.Stat.), may be dismissed from their agency because of a political change in the office of Governor. This issue involves First Amendment constitutional rights, which are entitled to protection under Title 42, United States Code, § 1983 et seq., as interpreted by this Court in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980).

The Court of Appeals in Part A of the opinion decided that "*Elrod* and *Branti* were limited to dismissals of public employees for partisan reasons",[1] and then determined that petitioners are not public employees.

In Part B, the Court of Appeals decided that even if *Elrod* and *Branti* applied to dismissal of fee agents, petitioners could still be terminated "because party affiliation is an appropriate requirement for the effective performance of the offices."

Petitioners believe that the Court of Appeals not only erred in each of these holdings but has decided the important federal questions involved in conflict with the decisions of this Court. Furthermore, to the extent that the Court of Appeals was "not willing to extend the patronage decisions [*Elrod* and *Branti*] to cases which do not involve public employees" (669 F. 2d at 545), the Court of Appeals has acknowledged that it has decided an important question of federal law which has not been, but which petitioners believe should be, settled by this Court.

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[1] There is no dispute that petitioners were dismissed for partisan reasons — see fn. 5 of *Sweeney* v. *Bond*, 669 F. 2d 542, at 544.

A. **Applicability of *Elrod* and *Branti* to nonemployees.**

The Court of Appeals held that petitioners were not "public employees"[12] and therefore not protected from dismissal because of their political affiliations. The Court was "not willing to extend the patronage decisions to cases which do not involve public employees." 669 F. 2d at 545.

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[12] Petitioners believe that, considering the relationship of fee agents to the State of Missouri and the control exercised by the Governor and Director of Revenue, a viable argument can be made that fee agents should be in the broad category of "public employees". See criteria for determining whether a questioned relationship is employer/employee in Restatement of Agency 2d, § 220, p. 485.

The Director of Revenue exercises considerable control over fee agents. He appoints them as agents "of the department of revenue" (§ 136.055), and he supervises, participates in, or sanctions locations (Tr. 170), hours (Tr. 146-147, 260), telephones (Tr. 146, 214, 237, 489, training (Tr. 144-145, 182, 188, 213, 236, 253), and bank accounts (Tr. 133-135). The Department of Revenue furnishes the agents with a book on relevant statutes (Pltffs. Exh. 5) and an Operational Procedures Manual (Pltffs. Exh. 6), which strictly delineate the duties of the fee agent and leave no room for discretion or policy making. Memos from the Department of Revenue covering the entire range of office operation are frequently sent out addressed to both branch offices and fee agents — see Pltffs. Exh. 7 (Tr. 138, 140-141, 143, 187, 215, 236, 253). In fact, the Manager for the Field Services Bureau of the Department of Revenue acknowledged that these informational memos "show a very high degree of control exercised by the Department of Revenue over the branch and agent offices . . . as far as office procedures and operations" (Tr. 481).

The exercise of control by the Governor's Office is reflected generally in the policy promulgated in Executive Order 81-2 (Pltffs. Depos. Exh. 5; Tr. 327-329), and in numerous documents obtained from the Governor's files. The Governor's Office "recommended" (in actuality "appointed") most of the new fee agents in the first group appointed by Mr. James. Compare Pltffs. Exh. 21 with the names on Mr. Cumbee's recommended list (Pltffs. Depos. Exh. 25; Tr. 358-361). If the Governor was obligated to two political associates for appointment, he could resolve the matter by designating one as an agent and the other as an employee or manager or deputy (Tr. 335, 345, 536-537). The Governor's Office has determined precise locations

After acknowledging various forms of "the general practice of political patronage", this Court did state in *Elrod* that "we are here concerned only with the constitutionality of dismissing public employees for partisan reasons" (427 U.S. at 353). *Branti* v. *Finkel*, 445 U.S. 507 (1980), was also limited to this issue — see fn. 7 at p. 513. But this Court did not decide in either *Elrod* or *Branti* that "those to be protected must be *employees*", as the District Court stated in this case (519 F. Supp. at 130),[13] or that *Elrod* and *Branti* cannot be extended to nonemployees, as the Court of Appeals ruled. By recognizing the numerous other forms "of the general practice of political patronage" which were not in issue, *Elrod* and *Branti* certainly did not hold that other victims of the patronage system had no First Amendment protection.

It should also be noted that when *Branti* speaks (445 U.S. at 518) of party affiliation as "an appropriate requirement for the effective performance of the public office involved", it did not talk in terms solely of an employer-employee relationship, but

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of offices and banks to be used, and has discussed the appointment of fee agents as a means of rewarding contributors and raising funds for the Republican Party (Tr. 337-338, 347, 539, 542, 546-547; Depos. Exhs. 4, 18; *in camera* Doc. 36); the appointment of fee agents has been a useful tool in legislative "logrolling" (Tr. 346). Such control by the Governor's Office, exercised independently of or in conjunction with the Director of Revenue, required a finding that fee agents are "public employees" in a fertile area for partisan political patronage, and are thus subject to the *Elrod-Branti* doctrine.

[13] The District Court had doubts as to its ruling in this respect, for Judge Cahill suggested that an *Elrod-Branti* extension "will surely require delineation in the future" (519 F. Supp. at 130), and "that the critical analyses of patronage in the opinions of the Supreme Court might someday lead to an extension of the protection now afforded . . . It is conceivable that in addition to employees, this extension could well include awards of government contracts, licenses, franchises, and other government benefits" (519 F. Supp. at 131). See also the District Court's opinion in granting an injunction pending appeal (519 F. Supp. at 132-133), affirmed by the Court of Appeals (669 F. 2d at 547).

instead used the phrase "public office". Section 136.055 of the Missouri statutes denominates a fee agent "as an agent of the department of revenue", and it cannot be logically argued that a fee agent does not hold a "public office".

The Court of Appeals stated that the District Court held that "fee agents are not employees of the State of Missouri but are more in the nature of independent contractors or franchisees." Insofar as the protection mandated by *Elrod* and *Branti* is concerned, we think that this characterization as an independent contractor or franchisee is a distinction without a difference. In *Lefkowitz* v. *Turley*, 414 U.S. 70, 83 (1973), this Court stated that a contractor is entitled to the same protection as an employee:

> "We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."

That *Elrod* is not limited just to employees also appears from *Fullilove* v. *Klutznick*, 448 U.S. 448, 542 (1980) (Stevens, J., dissenting):

> "As Mr. Justice Brennan noted in Elrod v. Burns, 427 U.S. 347, however, the award of such contracts may become a form of political patronage that is dispensed by the party in power. Although the practice of awarding such contracts to political allies may be as much a part of our history as the employment practices condemned in Elrod, it would surely be unconstitutional for the legislature to specify that all, or a certain portion, of the contracts authorized by a specific statute must be given to businesses controlled by members of one political party or another. That would be true even if the legislative majority was convinced that a grossly disproportionate share had been awarded to members of the opposite party in previous years.

> "In the short run our political processes might benefit from legislation that enhanced the ability of representatives of minority groups to disseminate patronage to their political backers. But in the long run any rule that authorized the award of public business on a racial basis would be just as objectionable as one that awarded such business on a purely partisan basis."

Elrod and *Branti* related to deputy sheriffs and assistant public defenders, respectively. A deputy sheriff is appointed by an elected sheriff, although paid by the County or State, as the case may be. The assistant public defenders in *Branti* were appointed by the public defender who was himself appointed by elected officials, thus being analogous to fee agents appointed by Mr. James who was appointed by the elected Governor. The fact that fee agents receive their compensation from customers with whom they do business is not decisive of the issue in this case; it is no different from an appointed person being paid by a County or State rather than the "appointing authority" or the "employer". Although we have been unable to find any case citing *Elrod* and *Branti* in which the relationship is exactly like that in the instant case,[14] we do not believe that *Elrod* and *Branti* must be limited to a conventional employer-employee relationship, but it should apply to all relationships subject to abuse for political purposes.

There have been numerous cases, both before and after *Elrod*, in which this Court has assiduously protected First Amendment rights. It has recognized freedom of speech, press, and assembly, and has given religious freedom protection to all people. *Sherbert* v. *Verner*, 374 U.S. 398 (1963), recognized the right of a Seventh Day Adventist to the benefits of unemploy-

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[14] But compare *McMullan* v. *Thornburgh*, 508 F. Supp. 1044 (E.D. Pa. 1981), involving local health registrars compensated on a fee per transaction basis.

ment compensation. Such cases speak of "benefits" as opposed to "rights", and protect the claimant of such benefits under First Amendment principles. Compare *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972). In fact, *Elrod* speaks of the benefit theory, and right versus privileges, in Section VI of the opinion, and says (427 U.S. at 361):

> "The denial of a public benefit may not be used by the Government for the purpose of creating an incentive enabling it to achieve what it may not command directly."

First Amendment rights have also been protected for persons other than ordinary employees. In *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), a person refused to declare his belief in the existence of God and, for that reason, was denied appointment to the office of notary public by the Governor of Maryland, pursuant to a provision of the Maryland Constitution. This Court unanimously held (367 U.S. at 496) that the Maryland test "for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." If a State may not, through religious tests contrary to the First Amendment, deny a public office to a notary public, who receives his fees from his customers and is subject to less controls by the State than fee agents in the instant case, then petitioners cannot be denied the right to the agency to which they have been appointed, on the equally pernicious First Amendment violation of freedom of speech and assembly.

To summarize, we believe that irrespective of how petitioners' relationship as appointed fee agents may be characterized, the holdings of *Elrod* and *Branti* and the principles of the First and Fourteenth Amendments require that they be protected from dismissal for partisan political reasons.

B. Party affiliation as an appropriate requirement for effective performance.

In *Branti* v. *Finkel,* 445 U.S. at 518, this Court said:

> "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

We believe that the Court of Appeals has misconstrued this Court's decision, and by sanctioning the dismissal of 158 fee agents for partisan political reasons, has destroyed the constitutional protection granted by *Elrod* and *Branti*.

The Court of Appeals quoted from the conclusions of the District Court that fee agents reflect the concern of respondents for "courtesy, efficiency and integrity." Any public official should have similar concerns, but it is a fallacy to imply that these attributes can only be secured from those affiliated with the same political party as the Governor. Both Courts overlooked the fact that *Branti* places the burden of proof on the hiring authority. Here there was no evidence to support a conclusion that any of the petitioners lacked courtesy, efficiency or integrity.[13] Speculation is required, unless the Court may assume that all non-Republicans would intentionally undermine the incumbent administration. Furthermore, proof of lack of courtesy, efficiency and integrity could provide justifiable cause for termination, without affront to First Amendment rights.

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[13] To the contrary, the District Court found no cause for dismissal as to any petitioner, and concluded (519 F. Supp. at 130):

> "As to plaintiffs Schenberg and Light, not one word of criticism scorched their pages of performance. There was not one word of testimony offered or exhibit tendered to show that plaintiff Schenberg was guilty of any misconduct or nonfeasance in any respect. Indeed, the Court was duly impressed with the candor, apparent industry, and community concern of plaintiff Schenberg, who took her duties seriously and performed them personally in the manner of an exemplary public servant."

The plurality opinion in *Elrod* anticipated this attempted justification of dismissals for non-loyalty reasons. But it gave some guidelines, to the extent that if there is a paramount legitimate state interest, "one of vital importance", for replacement of an employee, "the burden is on the government to show the existence of such an interest" (427 U.S. at 362). Respondent James' testimonial efforts (Tr. 526, 533-535)[16] to create such a paramount, vitally important state interest were unconvincing, factually as well as legally. He automatically assumed that all incumbent fee agents were of the Democratic "persuasion" (Tr. 512-513), and he testified about his interest in building the Governor's partisan political organization (Tr. 534-535). But that is exactly what *Elrod* says cannot be done (427 U.S. at 362): ". . .care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice."

Branti did not lessen the *Elrod* protection. We believe that *Branti* suggests that there are occasions when policy-making may not be the sole test, but it clearly holds that respondents in this case had the burden of demonstrating that party affiliation

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[16] Although the Court of Appeals ruled that "political affiliation is an appropriate requirement for the effective performance of fee agents", respondent James would not even go that far in his testimony (Tr. 526):

> "Q Mr. James, regarding motor vehicle license agents, do you think party affiliation is an appropriate requirement for the appointment of motor vehicle license agents?
>
> "A I wouldn't use the word requirement but it is an appropriate factor to be considered."

is a legitimate consideration.[17] We do not believe that *Branti* withdrew any of the First Amendment protection given by *Elrod*, but it merely reiterated it in slightly different language, as quoted at the outset of this Part B.

But, whether *Branti* is a restatement of the *Elrod* test or whether it is a different test, petitioners were entitled to injunctive relief here because the evidence clearly showed that they were discharged because of their political beliefs, and respondents did not satisfy their burden under *Branti* of demonstrating "that party affiliation is an appropriate requirement for the effective performance of the public office" of fee agent.[18] Respondent James' lengthy testimonial monologue on

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[17] Not only did respondents fail to sustain their burden, but petitioners were erroneously restricted from factually contesting the issue. They were denied access to the Governor by deposition or at trial. No witness was able to explain the Governor's purpose in issuing Executive Order 81-2 (Pltffs. Depos. Exh. 5; Tr. 327-333, 399-400), which proclaimed that political activity "shall not be a condition of *appointment* or employment" and that "political affiliation of any individual shall not be a condition for any state department or agency in determining what individual, firm or corporation may do business with the state." The Governor's position on this Executive Order, applying to appointees, independent contractors, franchisees, or anyone who "may do business with the state", coupled with his stated positions during his first term and in his campaigns in 1976 and 1980 that politics would not be a factor in appointing fee agents (Tr. 201, 207, 588-589), made his testimony essential on this issue.

Similar error was committed in restricting cross-examination of respondent James (Tr. 560-567) as to his direct testimony on the party affiliation "factor". See fn. 16, *supra*.

[18] The Court of Appeals statement at the end of its discussion on this issue, that party affiliation as an appropriate requirement "has been so regarded by both Democrats and Republicans for many years", is as irrelevant as the long-standing patronage appointment system in the Cook County sheriff's office, which was declared constitutionally impermissible in *Elrod*. Note that the complaint in the District Court, as quoted by Justice Powell in dissent in *Elrod* (427 U.S. at 380), alleged that the practice there had also existed "for many years".

the importance of the patronage system among fee agents and the desire of the Governor to build his political organization through the fee agent offices was precisely what *Elrod* and *Branti* has condemned. His unhappiness with the *Elrod-Branti* doctrine should not have been vented on petitioners; he should find some method other than political dismissal of 158 fee agents to reverse this Court.

We believe that the District Court's statement that "fee agents are symbols of the governor's office" and the Court of Appeals discussion of fee agents' activities do not justify a conclusion that *Branti* authorizes their dismissal. *Branti* (445 U.S. at 518) gave three examples where party affiliation would be an appropriate requirement for a governor's assistant, to-wit: a speech writer, a press spokesman, or a legislative lobbyist. Obviously such people must be deeply involved with the governor's partisanship, but they bear no similarlity to a fee agent. The fee agent need be no more affiliated with the governor's party than a deputy sheriff with the sheriff's party (as in *Elrod*) or an assistant public defender with the public defender's party (as in *Branti*).

The "loyalty" requirement may be an argument for the patronage system, were it not condemned by *Elrod* (427 U.S. at 353, 364, 367) and by *Branti* (445 U.S. at 517, fn. 12). There is less need for political loyalty to a governor in Jefferson City, Missouri, from a fee agent performing his duties in St. Louis County or Rolla or Sikeston or St. Charles than there would be for a deputy sheriff serving papers in the same county of the sheriff whom he is representing. There is a much closer connection between the deputy sheriffs in Cook County as representatives of the sheriff. If the assumption of non-loyalty is a meritorious argument, then policemen appointed by a Board of Police Commissioners appointed by one governor should be terminated so that the new governor's new Board of Police Commissioners could appoint policemen "supportive" of his ad-

ministration. The 4.5 million transactions testified to by Mr. James (Tr. 526-527) and found by the Court are minuscule compared with the number of contacts that members of the United States Postal Service have with the American public; it would be disastrous to permit the Postal Service to replace all postmen.

We respectfully suggest that if the decision of the Court of Appeals herein is not reviewed by this Court, the "party affiliation" test of *Branti* will generate much more litigation and hopeless conflict. Lower courts are providing their own interpretations without apparent accord. Compare, for example, recent representative cases such as *Barrett* v. *Thomas,* 649 F. 2d 1193, 1199-1201 (5th Cir. 1981), *Nekolny* v. *Painter,* 653 F. 2d 1164, 1169-1170 (7th Cir. 1981), *Ness* v. *Marshall,* 660 F. 2d 517, 520-522 (3rd Cir. 1981), *Layden* v. *Costello,* 517 F. Supp. 860 (N.D.N.Y. 1981), *Brunton* v. *United States,* 518 F. Supp. 223, 237-240 (S.D. Ohio 1981), *Visser* v. *Magnarelli,* 530 F. Supp. 1165, 1171-1173 (N.D.N.Y. 1982), and *Battaglia* v. *Union County Welfare Board,* 88 N.J. 48, 438 A. 2d 530, 535-539 (N.J. 1981).

It should be noted that in most of these cases a formal written job description will generally provide evidence relevant to the party affiliation test. In the instant case, there is no such job description for fee agents, nor was there any concrete evidence produced by respondents (on whom *Branti* places the burden of proof) which would be of assistance. There is of course the language of § 136.055 of the Missouri Statutes which provides for the appointment, duties and compensation of fee agents. We suggest that the freedom of activity afforded to fee agents, to which the Court of Appeals referred, is convincing evidence that the job can be performed effectively without regard to party affiliation.

Actually, a job description for fee agents could be patterned after that for branch managers of the Department of Revenue. Aside from the method by which they are compensated, fee

agents perform exactly the same functions and are subject to the same supervision and controls as branch managers. For example, the memoranda in Plaintiffs' Exhibit 7 are for branch managers and fee agents (Tr. 480-481). Mr. Thaier, a witness for respondents, testified that he is Bureau Manager for the Field Services Bureau, which is "responsible for the administration of the *branch and fee offices* throughout the State of Missouri" (Tr. 456). [Emphasis supplied.] Respondent James testified that branch managers have the same "level of contact" with the public as fee agents (Tr. 527).

When respondents attempted to dismiss branch managers for political reasons, they were enjoined. See *Gibbons* v. *Bond*, 523 F. Supp. 843 (W.D. Mo. 1981). The District Court for the Western District of Missouri ruled that political affiliation is not an appropriate requirement for the effective performance of the job of branch manager.[19] In so ruling, the Court quoted the job description for branch managers (523 F. Supp. at 846-847, fn. 2), which would apply with equal force to fee agents.

On appeal to the Court of Appeals for the Eighth Circuit, the District Court was affirmed in *Gibbons* v. *Bond*, 668 F. 2d 967 (8th Cir. 1982), decided by the same panel that issued the opinion herein. The need for clarification of the *Branti* party affiliation test becomes more important when such conflicts can result within one day of each other.

Without further review by this Court, we submit that lower courts[20] will continue to create absolute confusion as to how the

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[19] It is interesting to note the District Court's comments as to the lack of credit given the testimony of respondent James. 523 F. Supp. at 850, 851.

[20] Some of whom have acknowledged disagreement with the philosophy of *Elrod* and *Branti*. See, for example, *Brunton* v. *United States*, 518 F. Supp. 223, 238 (S.D. Ohio 1981), and *Visser* v. *Magnarelli*, 530 F. Supp. 1165, 1173-1175 (N.D.N.Y. 1982).

party affiliation test may be applied. It may be of little consequence when one person,[21] or three people[22] are dismissed, but when 158 agents are affected in one sweep, the possibilities are staggering and the *Elrod-Branti* protection for First Amendment rights is in serious jeopardy.

Because of the necessity of reviewing and deciding the serious First Amendment issues involved in this case, having impact on persons working for or dealing with every municipal, county, state and federal government throughout the country, and because of the increasing flow of lower court decisions in dire need of guidance from this Court, we respectfully suggest that certiorari should be granted.

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[21] *Battaglia* v. *Union County Welfare Board*, 88 N.J. 48, 438 A. 2d 530 (N.J. 1981).

[22] *Ness* v. *Marshall*, 660 F. 2d 517 (3rd Cir. 1981).

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted. The judgment of the Court of Appeals should be reversed, with directions that the District Court be ordered to grant injunctive relief to petitioners and such other relief as the District Court may find appropriate, within the framework of 42 U.S.C. § 1983 et seq.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 81-1815

Charles E. Sweeney and Adele Schenberg on behalf of themselves and all other persons similarly situated; Rory Riddler; Dorothy Light; Juanita Briggs,
Appellants,

v.

Christopher S. (Kit) Bond, individually and as Governor of the State of Missouri; Ray S. James, individually and as Director of the Department of Revenue of the State of Missouri; Ernestine Beckman; Gerard J. Schmidt,
Appellees.

No. 81-1816

Charles E. Sweeney and Adele Schenberg on behalf of themselves and all other persons similarly situated; Rory Riddler; Dorothy Light; Juanita Briggs,
Appellees,

v.

Christopher S. (Kit) Bond, individually and as Governor of the State of Missouri; Ray S. James, individually and as Director of the Department of Revenue of the State of Missouri; Ernestine Beckman; Gerard J. Schmidt

Ellie O'Donnell; Denise Funderburk and Terry Cole,

Appellants.

No. 81-1817

Charles E. Sweeney and Adele Schenberg on behalf of themselves and all other persons similarly situated; Rory Riddler; Dorothy Light; Juanita Briggs,

Appellees,

v.

Christopher S. (Kit) Bond, individually and as Governor of the State of Missouri; Ray S. James, individually and as Director of the Department of Revenue of the State of Missouri

Ernestine Beckman and Gerard J. Schmidt,

Appellants.

No. 81-1878

Bert Stewart,
Appellant,

v.

Christopher S. (Kit) Bond, Individually and as Governor of the State of Missouri and Ray S. James, Individually and as Director of the Department of Revenue of the State of Missouri,
Appellees.

No. 81-1906

Bert Stewart,
Appellee,

v.

Christopher S. (Kit) Bond, Individually and as Governor of the State of Missouri; and Ray S. James, Individually and as Director of the Department of Revenue of the State of Missouri

Delores Cook,
Appellant.

No. 81-2154

Mary Jane Joos,
Appellant,
William Otto Haag, Jr.,

v.

Christopher S. (Kit) Bond, Individually
and as Governor of the State of Missouri;
Ray S. James, Individually and as
Director of the Department of Revenue
of the State of Missouri,
Appellees.

Appeals from the United
States District Court
for the Eastern
District of Missouri

Submitted: November 12, 1981

Filed: *January 13,* 1982

Before ROSS and STEPHENSON, Circuit Judges and HOWARD, District Judge.*

* The Honorable George Howard, Jr., United States District Judge for the Western District of Arkansas, sitting by designation.

ROSS, Circuit Judge.

Plaintiffs in these consolidated cases alleged they were dismissed from their positions as fee agents for the State of Missouri because of their political affiliation and in violation of the first amendment. The district courts[1] in separate memoranda[2] held that fee agents were not state employees and thus were not protected from dismissal based on political affiliation. We affirm.

Facts

Plaintiffs were fee agents[3] for the Missouri Department of Revenue. All of the plaintiffs were active Democrats and all were appointed as fee agents during the administration of former Governor Joseph Teasdale, also a Democrat. Defendant Christopher Bond is presently the Governor of Missouri. Defendant Ray James was appointed by Governor Bond as the Director of Revenue. Both Bond and James are Republicans. Additional defendants in this action are persons appointed by James as successor fee agents. The majority of the successor fee agents are Republicans.

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[1] The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri. The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri. The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

[2] *Sweeney* v. *Bond,* 519 F.Supp. 124 (E.D. Mo. 1981) was rendered by Judge Cahill on May 19, 1981. *Joos* v. *Bond,* No. 81-1022-C(4) (E.D. Mo., filed Sept. 28, 1981) was written by Judge Hungate. *Stewart* v. *Bond,* No. 81-0811-C(1) (E.D. Mo., filed Oct. 13, 1981) was written by Judge Wangelin. Reference to the district courts' proceedings will be to Judge Cahill's opinion which is representative of the other opinions.

[3] Fee agents are authorized under MO. REV. STAT. § 136.055 to issue motor vehicle licenses and to collect motor vehicle sales and use taxes as agents of the Department of Revenue. Fee agents receive no salary from the Department of Revenue but are authorized to charge the customer one dollar for each transaction as compensation for their services.

Plaintiffs alleged their dismissals[4] were based solely on their political affiliation and requested declaratory and injunctive relief and both compensatory and exemplary damages. The district courts denied plaintiffs relief and this appeal followed.

Discussion

Plaintiffs assert they are protected from dismissal based solely on their political affiliation[5] by the Supreme Court's holdings in *Elrod* v. *Burns*, 427 U.S. 347 (1976) and *Branti* v. *Finkel*, 445 U.S. 507 (1980). In *Elrod*, the Court held that

> public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state[d] a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments.

Elrod v. *Burns, supra*, 427 U.S. at 349. The Court in *Branti* applying the principles of *Elrod* held that the termination of an assistant public defender "on purely political grounds" violated the first and fourteenth amendments. *Branti* v. *Finkel, supra*, 445 U.S. at 520.

Defendants assert that *Elrod* and *Branti* have no applicability to the terminations of fee agents because those cases addressed only the terminations of public employees and fee agents are not employees of the State of Missouri. Defendants further argue that even if the holdings in *Elrod* and *Branti* apply to the dismissal of fee agents, fee agents are not protected from ter-

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[4] The defendants have agreed to postpone the effective dates of the terminations pending the outcome of these cases.

[5] The district court held that "partisan polical affiliation played a substantial role in all of the dismissals." *Sweeney* v. *Bond*, 519 F.Supp. 124, 130 (E.D. Mo. 1981). On appeal defendants do not dispute the political motivation of the dismissals.

mination because party affiliation is an appropriate requirement for the effective performance of the office. We agree with both of defendants' arguments.

A. Applicability of *Elrod* and *Branti* to nonemployees.

Elrod v. *Burns, supra,* 427 U.S. 347, involved the traditional practice of the Sheriff of Cook County, Illinois, of replacing non-civil-service employees of the Sheriff's office with members of his own party, upon assuming office. The plurality opinion, by Justice Brennan, restricted the issue addressed by the Court to the constitutionality of dismissing public employees for partisan reasons:

> The Cook County Sheriff's practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage. The practice also includes placing loyal supporters in government jobs that may or may not have been made available by political discharges. Nonofficeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies. Favored wards may receive improved public services. Members of the judiciary may even engage in the practice through the appointment of receiverships, trusteeships, and refereeships. Although political patronage comprises a broad range of activities, *we are here concerned only with the constitutionality of dismissing public employees for partisan reasons.*

427 U.S. at 353 (emphasis added) (footnote omitted).

The opinion of the concurring Justices stated that:

> The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs.

427 U.S. at 375.

As in *Elrod* the issue presented in *Branti* v. *Finkel, supra,* 445 U.S. 507, was the dismissal of public employees for partisan reasons. There, the Court stated that the issue was

> whether the First and Fourteenth Amendments to the Constitution protected an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs.

445 U.S. at 508. That assistant public defenders were public employees was not a disputed fact in *Branti.*

We agree with defendants and the district courts that the holdings in *Elrod* and *Branti* were limited to dismissals of public employees for partisan reasons. We are not willing to extend the patronage decisions to cases which do not involve public employees. Thus, the principal inquiry becomes whether fee agents are public employees.

The district courts in the present cases held that "fee agents are not employees of the State of Missouri but are more in the nature of independent contractors or franchisees." *Sweeney* v. *Bond,* 519 F.Supp. 124, 128 (E.D. Mo. 1981). The finding that fee agents are not public employees is well supported by the facts presented at trial. The Department of Revenue does not supervise the daily operations of the fee agencies, does not require the fee agents to account for fees collected and does not supervise the hiring and firing of employees within the offices. Fee agents are not paid by the state and are not required to work in their offices. Fee agents pay all of their own expenses, including rent, employees' salaries and office equipment. Fee agents pay self-employment taxes and are not members of the state retirement system. Many fee agents hire others to supervise employees in the fee agent's office and do not participate directly in the operation of the office.

We affirm the holding of the district court that "[s]ince fee agents are not state employees, they are not protected from dismissal because of their political affiliations." *Id.* at 129.

B. Party affiliation as an appropriate requirement for effective performance.

Although we base our affirmance of the district courts' opinions on our holding that fee agents are not protected under *Elrod* and *Branti* we believe defendants' second contention deserves discussion. Defendants' second argument is that if *Elrod* and *Branti* do apply to dismissal of fee agents, the fee agents may still be terminated because party affiliation is an appropriate requirement for the effective performance of the offices.

In *Branti* v. *Finkel, supra,* 445 U.S. at 517, the Court stated that "*Elrod* recognize[d] that party affiliation may be an acceptable requirement for some types of government employment." The burden is on the hiring authority to "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. We believe defendants in this case have carried their burden.

The district court held that party affiliation was an appropriate requirement for the position of fee agent because fee agents

> serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.

Sweeney v. *Bond, supra,* 519 F.Supp. at 129.

Fee agents are not required to work in their offices. They are free to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in

political activities free of the restrictions of a civil service code and without interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not resricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement for the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years.

Additional Issues

Three additional issues were raised on appeal: (1) whether the district court erred by refusing to require Governor Bond to submit to deposition; (2) whether successor fee agents should have been allowed to intervene; and (3) whether the district court erred by entering an injunction against defendants pending appeal.

The district court held that the Governor's qualified immunity protected him from deposition absent a showing by plaintiffs of specific need. Plaintiffs failed to show that Governor Bond possessed information which was essential to plaintiffs' case and which could not be obtained from Director James or other staff members. The district court did not abuse its discretion in requiring plaintiffs to show specific need for the information. *See Halperin* v. *Kissinger*, 606 F.2d 1192, 1209-10 n.120 (D.C. Cir. 1979), *aff'd*, 49 U.S.L.W. 4782 (U.S. June 22, 1981).

Successor fee agents sought to intervene after final judgment was entered. The district court held that the application was untimely under FED. R. CIV. P. 24 and that defendants Bond and

James adequately represented the interests of the successor fee agents. We do not find an abuse of discretion in the denial of the application for intervention.

The district court granted an injunction pending appeal under FED. R. CIV. P. 62(c). The court analyzed the four elements set out in *Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Ass'n*, 409 F.Supp. 233, 263 (W.D. Mo. 1976) concerning injunctions on appeal and concluded that these cases presented questions of first impression and the risk of harm to plaintiffs outweighed possible harm to defendants or the public. We agree generally with the courts' determination of this issue and affirm the granting of the injunction pending appeal. However, we direct that the injunctions now be lifted in carrying out the terms of this opinion.

The judgments of the district courts are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1815

September Term, 1981

Charles E. Sweeney and Adele Schenberg on behalf of themselves and all other persons similarly situated;, et al,
Appellants,

vs.

Christopher S. (Kit Bond, etc., et al,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

February 4, 1982

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-0261-C (5)

Charles E. Sweeney, et al.,
Plaintiffs,

v.

Christopher S. (Kit) Bond, et al.,
Defendants.

MEMORANDUM AND ORDER

(Filed April 14, 1981)

This matter is before the Court on the plaintiffs' motion to dissolve the protective order with respect to taking the deposition of Governor Christopher S. (Kit) Bond.

The plaintiffs are fee agents of the Missouri Department of Revenue. Each of these plaintiffs was appointed by ex-Governor Joseph Teasdale, a Democrat. The plaintiffs allege that their appointments are about to be terminated by the new Republican administration because of the plaintiffs' political affiliation. Plaintiffs allege that termination of appointments would violate *Elrod* v. *Burns,* 427 U.S. 347 (1976), and *Branti* v. *Finkel,* 445 U.S. 507 (1980). Plaintiffs sought to depose Governor Bond for the purpose of discovering the relation of the Governor to the terminations of the plaintiffs and the appointment of the new fee agents. The Court granted a protective order to prevent the deposition of the Governor until such time as the plaintiffs could demonstrate sufficient need to overcome the Governor's claim of executive privilege. The plaintiffs then

deposed Ray James, the Director of the Department of Revenue, and James Cumbee, formerly an Administrative Aide to the Governor and the Governor's liaison with the Department of Revenue. The plaintiffs also propounded interrogatories to Governor Bond concerning the plaintiffs' terminations and the appointment of their successors. The plaintiffs now seek to dissolve the protective order so that they may inquire into the Governor's personal involvement in the fee agent terminations and appointments. The defendants contend that the deposition of Governor Bond is unnecessary because the Governor "has no knowledge of facts relevant to the contentions raised which is not also possessed by Mr. James." Defendants also contend that the deposition of the Governor constitutes an undue and oppressive burden.

Close control of pretrial discovery in suits against government officials is essential to the preservation of meaningful official immunity. *Halperin* v. *Kissinger,* 606 F.2d 1192, 1209-10 n.120 (D.C.Cir. 1979). The claim of executive privilege and the governmental interest in confidentiality between officials must be balanced against the plaintiffs' need for relevant evidence since such evidence is essential to the fair administration of justice. *See U.S.* v. *Nixon,* 418 U.S. 683, 711-13 (1974) (criminal trial context); *Halperin* v. *Kissinger,* 606 F.2d at 1209-10 n.120 (D.C.Cir. 1979). Where a party demonstrates the materiality of information concerning official decision-making, the initial inquiries should be directed toward subordinate officials before santioning discovery that burdens the time of high-level officials. *Halperin,* 606 F.2d at 1210 n.120. If a demonstrated, specific need for evidence remains after the party has exhausted all reasonable alternatives for obtaining such information, then a generalized assertion of executive privilege must yield. *See U.S.* v. *Nixon,* 418 U.S. at 713.

The plaintiffs here have not demonstrated a specific need sufficient to overcome the claim of privilege. The responses of

Governor Bond and Director James to the interrogatories propounded by the plaintiffs indicate that the decisions to terminate fee agents were made primarily by the Director of Revenue. The influence or control exercised by Governor Bond may have little bearing on the issues the Court must decide inasmuch as the documents submitted *in camera** do not conclusively establish that the Governor was the sole source of any political motivation for the fee agent terminations. Those documents suggest that Governor Bond relied on information supplied by James, Cumbee, and others in making his recommendations for appointments. If the plaintiffs can show that their terminations were based on their political affiliations, either through testimony or by statistical evidence, the testimony of Governor Bond might well be unnecessary. The plaintiffs have not shown that Governor Bond possesses information that is essential to their case which is not known by Director James or other members of the Governor's staff. If, at trial, issues arise which require knowledge or information which the Governor *alone* possesses (*e.g.*, a dismissal for a cause known to the Governor's staff), the Court will make provisions for the plaintiffs to depose Governor Bond in order to resolve those issues. At present, it is unnecessary and premature to require the Governor's deposition.

IT IS SO ORDERED.

Dated this 14th day of April, 1981.

/s/ Clyde S. Cahill
United States District Judge

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* These documents were submitted for *in camera* inspection because most were interoffice memoranda which contained, in part, confidential information not germane to the issues in this case. For a discussion of the presumptive privilege for confidential executive memoranda *see U.S.* v. *Nixon*, 418 U.S. at 703-13.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 81-0261-C (5)

Charles E. Sweeney, and Adele Schenberg,
Plaintiffs,

and

Rory Riddler, Dorothy Light, and Juanita Briggs,
Plaintiff-Intervenors,

v.

Christopher S. (Kit) Bond, Individually and as Governor of the State of Missouri; Ray S. James, Individually and as Director of the Department of Revenue of the State of Missouri; Ernestine Beckman, and Gerard J. Schmidt,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

(Filed May 19, 1981)

This matter is before the Court for judgment on the merits.

Charles Sweeney and Adele Schenberg, plaintiffs, brought this action against the defendants, Missouri Governor Christopher S. (Kit) Bond, Director of Revenue Ray James, and others, under 42 U.S.C. § 1983. Plaintiffs allege that their appointments as (motor vehicle license and tax) fee agents for the State of Missouri are being terminated because of the plaintiffs' political affiliation, and thus, in violation of their First Amendment rights, as defined by recent decisions of the U. S. Supreme

Court. Fee agents Rory Riddler, Juanita Briggs, and Dorothy Light later intervened as plaintiffs. The defendants contend that fee agents are not employees of the State of Missouri, and thus, their appointments may properly be terminated because of their political affiliation. Defendants submit that even if the fee agents are state employees, political affiliation is nonetheless an appropriate requirement for appointment. The defendants also assert that plaintiffs were terminated for cause.

This matter was tried before the Court without a jury on April 16 and 17, 1981.

After consideration of the pleadings and briefs, the testimony adduced at trial, the exhibits introduced into evidence, and the applicable law, the Court makes the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law is adopted as such, and conversely, any conclusion of law equally applicable as a finding of fact is so adopted.

Findings Of Fact

1. The plaintiffs, Charles Sweeney, Adele Schenberg, Rory Riddler, Juanita Briggs, and Dorothy Light, are fee agents for the Missouri Department of Revenue. All of the plaintiffs are active Democrats and all were appointed as fee agents during the administration of former Governor Joseph Teasdale, also a Democrat.

2. Defendant Christopher Bond is now the Governor of Missouri. Shortly after his inauguration on January 12, 1981, Governor Bond appointed defendant Ray S. James as the Director of Revenue. Both Bond and James are Republicans. Defendants Ernestine Beckman and Jerry Schmidt are persons appointed by defendant James as successor fee agents for Sweeney and Schenberg, respectively.

3. All of the plaintiffs, with the exception of Dorothy Light, have been notified by defendant James that their appointments

as fee agents are being terminated.[1] With the exception of the office of plaintiff Riddler, James has appointed successors to operate the fee agent offices held by the plaintiffs. All of the persons appointed by James to replace the plaintiffs are Republicans.

4. Fee agents are authorized under Mo. Rev. Stat. § 136.055 to issue licenses and collect taxes and fees. That statute provides:

> 1. Any person who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes under the provisions of section 144.440, RSMO, and *who receives no salary from the department of revenue* shall be authorized to collect from the party requiring such services additional fees as compensation in full and for all services rendered on the following basis:
>
> > (1) For each motor vehicle or trailer license sold, renewed, or transferred—one dollar;
> >
> > (2) For application or transfer of title—one dollar;
> >
> > (3) For each chauffeur's, operator's or driver's license—one dollar;
> >
> > (4) No notary fee or other fee or additional charge shall be paid or collected.
>
> 2. This section shall not apply to agents appointed by the director of revenue in any city where the department of revenue maintains an office.
>
> (Emphasis added.)

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[1] The defendants have agreed to postpone the effective dates of the terminations pending the outcome of this case.

There are 158 fee agent offices in Missouri. At the time of Governor Bond's inauguration, 21 fee agent offices were operated by nonpartisan civic organizations, and one office was operated by a municipality. All other fee agent offices were held by Democrats who were appointed under the Teasdale administration. Since his appointment as Director of Revenue, James has terminated ten fee agent appointments held by Democrats and appointed agents to fill two vacant offices. All of the agents who have been appointed by James are Republicans.

5. While the Department of Revenue does exercise a modicum of control over the general operations of the fee agent offices, it leaves management functions to the fee agents. Although fee agents are required to deposit the money collected for taxes and fees in state accounts, their own fees need not be accounted for. Accounting reports and bank statements must be filed. Relocation of a fee agent office requires the prior approval of the Department of Revenue. Specific business hours are selected by the agent, subject to the approval of the DOR. The DOR also holds fee agent training seminars for fee agents and their employees. The DOR supplies each office with a person to act as photographer/vision tester for persons obtaining or renewing driver's licenses. The DOR also supplies each office with a Wide Area Telephone Service (WATS) line and lists fee agent offices under the heading of Department of Revenue in the telephone directory.

6. But the Department of Revenue does not supervise the daily operations of the fee agent offices. Fee agents are free to hire employees to operate the offices for them or they may operate the offices themselves without additional personnel. Plaintiff Schenberg worked in her office with three or four employees. Plaintiff Sweeney did not work in his office but hired ten employees and an additional vision tester. Plaintiff Riddler had eight employees. The state does not exert control over the selec-

tion or retention of the fee agent's office employees. As provided for in Mo. Rev. Stat. § 136.055, fee agents are not compensated by the state but instead are authorized to charge persons requiring their services $1.00 per transaction as compensation. Fee agents are free to select their office location (subject to DOR approval) and are required to pay their own operating expenses, including rent, employees' salaries, and office equipment and supplies. Fee agents are permitted to engage in outside business activities and the majority do. Plaintiff Sweeney is an independent insurance agent. Plaintiff Briggs operates her office together with a restaurant. Fee agents pay self-employment taxes and are not members of the state retirement system. The Social Security Administration has determined that for Social Security tax purposes fee agents are not employees of the State of Missouri. In addition, with the exception of plaintiff Sweeney, none of the plaintiffs considered himself or herself an employee of the state.

Finally, and of particular importance, there is no DOR requirement that the fee agents actually work at all in their agencies. The DOR does require that the agents remain responsible for the work performed by their employees. The fee agents, like independent contractors, are merely responsible for supervision of their employees.

7. Plaintiff Schenberg operates the fee agent office in Creve Coeur, Missouri. In 1980, approximately 78,000 transactions occurred at her office, from which Schenberg netted $39,000.

8. Plaintiff Riddler operates the fee agent office in St. Charles. From approximately 135,000 transactions in his office in 1980, he netted between $25,000 and $26,000.

9. Plaintiff Briggs operates the fee agent office in Sikeston. In 1980, she netted between $15,000 and $20,000 from the 39,000 transactions made at her office.

10. Plaintiff Light operates the office in Rolla. She netted about $34,000 from the 49,000 transactions made at her office.

11. Plaintiff Sweeney operates the Moline Acres office. From approximately 120,000 to 130,000 transaction, Sweeney netted about $23,000.

Conclusions Of Law

1. In 1976, the Supreme Court held that a non-policymaking, nonconfidential government employee cannot be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. *Elrod* v. *Burns,* 427 U.S. 347, 375 (1976). The plaintiffs in *Elrod* were non-civil-service employees of the Cook County, Illinois, Sheriff's Office, who held positions as the chief deputy, bailiff, and process server. It had been the practice for the incoming Sheriff of Cook County to replace such employees with members of his own party when the existing employees lacked or failed to obtain political support from the incoming Sheriff's party. *Elrod* at 350-51. The Court found that dismissing those employees because of their political beliefs violated the First and Fourteenth Amendments. *Elrod,* 373, 375. Justice Brennan's plurality opinion discussed several other aspects of the patronage system, including hiring practices, contract awards, and improved public services, but the Court expressly did not rule upon the applicability of the holding to any class other than patronage dismissal of *employees.*

It might be reasonable to infer from Justice Brennan's plurality opinion that patronage in all its varied forms was an impediment to First Amendment exercise, and that all such patronage practices would be subject to the same restrictions as patronage dismissals. But a careful reading of the concurring opinion of Justices Stewart and Blackmun, together with the limitations expressed by Justice Brennan,[2] constitutes the actual

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[2] Justice Brennan recognized "[a]lthough political patronage comprises a broad range of activities, we are here concerned *only* with the constitutionality of dismissing public employees for partisan reasons. *Elrod,* 427 U.S. at 353. (Emphasis added.)

holding of the Court which is limited to patronage *dismissals* of *nonpolicymaking* and *nonconfidential public employees.*

2. Four years later, in *Branti* v. *Finkel,* 445 U.S. 507, 519 (1980), the Supreme Court held that the continued employment of an assistant public defender could not properly be conditioned upon his allegiance to the political party in control of the county government. Justice Stevens' majority opinion stated that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; [but] rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved." *Branti* at 518. Justice Stevens noted the sweeping language contained in the *Elrod* plurality opinion and stated "[i]n that case, as in this, however, the *only practice* at issue was the dismissal of *public employees* for partisan reasons. *Elrod,* 427 U.S. 353; *id.* at 374. In light of the limited nature of the question presented, we have no occasion to address petitioner's argument that there is a compelling governmental interest in maintaining a political sponsorship system for filling vacancies in the public defender's office." *Branti* at 513, n.7. (Emphasis added.)

3. The first issue to be determined is whether fee agents are "employees" of the State of Missouri, and, if not, whether the proscriptions of *Branti* should apply even in the absence of an employer-employee relationship. Missouri has adopted the test of the *Restatement of Agency 2d,* § 220, for determining whether an agent is an employee or an independent contractor. *Cline* v. *Carthage Crushed Limestone Co.,* 504 S.W.2d 102 (Mo. 1973).

The *Restatement* provides:

> (1) A servant [employee] is a person employed to perform services in the affairs of another and who with respect to the physical conduct of the performance of the services is subject to the other's control or right of control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered.

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

4. The Court finds that fee agents are not employees of the State of Missouri but are more in the nature of independent contractors or franchisees. First, there is no requirement that fee agents actually *work* in their offices. Fee agents may select their employees and then delegate duties to them without DOR approval. Aside from accounting for the tax and license money

collected, fee agents operate their offices with autonomy not generally accorded State employees. Fee agents supply, at their own expense, office space and equipment, and pay salaries determined by the agents. Fee agents may, and frequently do, engage in other business endeavors. They may locate their fee agent office in commercial facilities. Agents are not paid by the State, but instead are statutorily authorized to charge the public for their services.[3] Fee agents pay self-employment taxes. They are not members of the state requirement system. With the exception of plaintiff Sweeney, none of the others considered themselves state employees. The control exercised by the state is de minimis when compared to the degree of freedom afforded fee agents over the general operation of their offices.

The establishment of fee agents has created a unique status for those holding these positions, quite unlike that of most secretaries, vision testers, cashiers, and clerks that work in the branch offices of the DOR.[4] Such employees make no policy, have no confidential relationship with the officials of state government, and are paid a salary for work that they themselves must perform. They clearly qualified for the protection enunciated ir. *Elrod* and *Branti.*

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[3] Plaintiff Sweeney has incorporated his business interests and fee agent office so that his income is a salary from that corporation.

[4] See memorandum and order of Judge Meredith in *Kaegel* v. *Teasdale,* No. 78-0086-1 (E.D.Mo. 2/18/78), in which secretaries, vision testers, cashiers and clerks were given injunctive relief protecting them from partisan dismissal.

It must be abundantly clear that such state employees in the branch offices are model candidates for such protection. Unlike the fee agents, they hold relatively low paid positions with absolutely no policymaking, supervisory, or confidential relationship. They must work full-time in their jobs; rarely are they holders of rank in political organizations, nor do they have titles, or any other income producing activity, and exert little influence or persuasion in governmental decision.

5. Since fee agents are not state employees, they are not protected from dismissal because of their political affiliations. The protections of *Elrod* and *Branti* were expressly limited to state employees and their narrow holdings do not protect plaintiffs herein. Accordingly, the Court holds that since fee agents are not state employees, their appointments may be properly terminated because of their political affiliation.

6. While the Court expressly feels that plaintiffs are *not* employees, and therefore not shielded by *Elrod,* even had the Court determined them to be employed by the state, they still would not prevail, for *Branti* makes the comment that where "party affiliation is an appropriate requirement for the effective performance of the office," patronage dismissal may be allowed. *Branti* at 518.

The fee agents have more than five million contacts with the public during their term and do serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.

First of all, there is little or no additional cost to the government, for the fees of the agents are simply added to the costs of the licenses and taxes, thus allowing the state the full and complete measure of its taxing bounty.

Second, any citizen wanting to avoid the agent's small fee can seek out a branch office or utilize the mails to pay the license fees and taxes without paying the $1.00 fee. He may have to forego the convenience of location or scheduled availability, but that would be a luxury that he could judge the value of and accept or decline.

Third, the requirements for filling the position of fee agent are simple and generic, no special skill or professional knowledge is needed, and thus large numbers of individuals could easily qualify for the posts with little difficulty in completing the work required.

Fourth, while not requiring the confidentiality and policymaking function of the top-level positions in state government, there is the responsibility of demonstrating loyalty, efficiency, and partisan pride, which could be interpreted as a hallmark of the incumbent administration.

Fifth, the fee holder can delegate practically all of the chores and responsibility of the office to others that he employs, and thus continue to actively and fully participate in the political activities of his choice without the restriction of a civil service code or the loss of services to the state, and

Sixth, the novel status of motor vehicle license fee agents supports the argument that the state interest in having such an unusual arrangement is an intentional and planned circumstance, designed to meet and overcome the shortcomings of most patronage assignments.

In summary, then, the fee agents are extraordinarily suited for partisan, political appointment, and may well be a near perfect example of the kind of role suggested in *Branti.*

7. There is no serious contention by either party that the fee agents hold policymaking jobs, for they exercise little discretionary responsibility and have no supervisory function over any but their own employees. The collecting of fees and licenses is strictly determined by statute, and audit standards for the entire Department of Revenue are enforced generally by the fiscal arm of the agency.

8. Obviously, too, none of the fee agents now hold, nor would any of the Bond appointees hold, any confidential relationship to the Director of Revenue because of their fee agent

status. In fact, they are hardly known to the Governor or his staff, but clearly are the selected choices of political leaders throughout the state who wish to reward party loyalty with a patronage "plum." If the Legislature believes a better approach would be to minimize this patronage, it might well enact legislation which would mandate a term concurrent with that of the Governor's, or provide only branch offices in the areas of high population (such as Moline Acres, Creve Coeur, and St. Charles), appointing fee agents in smaller or rural communities, or alternately, careful selection of municipalities or community organizations.

And yet, these fee agents, although nonpolicymaking, nonconfidential employees, are still not protected from patronage discharge, because *Branti* provides that, for some positions, "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. Fee agents are uniquely suited for that requirement.

9. It is apparent to this Court that partisan political affiliation played a substantial role in all of the dismissals. The evidence was replete with recommendations to Governor Bond by Republican leaders suggesting replacements for the Democratic incumbents. Defendant James testified that he believed fee agents must have partisan political allegiance in order to properly and loyally perform their functions; he indicated that recommendations by the Governor and his staff would be tantamount to appointment. While the evidence is perhaps minimally sufficient to sustain defendants' claim of discharge for cause against Sweeney and Riddler, it seems hardly sufficient to discharge a wife because of the sins of the husband, as in the Briggs matter, even if the recommendation to fire comes from a fellow Democrat. As to plaintiffs Schenberg and Light, not one word of criticism or complaint scorched their pages of performance. There was not one word of testimony offered or exhibit tendered to show that plaintiff Schenberg was guilty of any misconduct or nonfeasance in any respect. Indeed, the Court

was duly impressed with the candor, apparent industry, and community concern of plaintiff Schenberg, who took her duties seriously and performed them personally in the manner of an exemplary public servant.

The dilemma as to the logical extension of the First Amendment rights in *Elrod* and *Branti* to patronage activities in our government has been illustrated well by the concurring and dissenting opinions of the Justices; they will surely require delineation in the future. But a trial court is bound, as it must and should be, by express limitations established by the U.S. Supreme Court and those limitations are patently clear in the *Elrod* and *Branti* opinions. The Supreme Court now requires that those to be protected must be *employees.*

The Court is aware that the critical analyses of patronage in the opinions of the Supreme Court might someday lead to an extension of the protection now afforded. Other courts have found that the protections of *Elrod* and *Branti* extend to patronage hiring, demotions, and transfers, but in each case the disaffected party was clearly an employee. *Tanner* v. *McCall,* 625 F.2d 1183, 1189 (5th Cir. 1980); *Johnson* v. *Bergland,* 586 F.2d 993, 995 (4th Cir. 1978); *Morris* v. *City of Kokomo,* 381 N.E.2d 510, 518 (Ind. App. 1978); *McKenna* v. *Fargo,* 451 F. Supp. 1355, 1377 (D.N.J. 1978). It is conceivable that in addition to employees, this extension could well include awards of government contracts, licenses, franchises, and other government benefits. But now the holdings are expressly limited to the partisan dismissals of state *employees.* Unless it is enlarged by appellate review, this Court must abide by the present status of the law.

Accordingly, judgment is entered for the defendants and against the plaintiffs and the complaint is dismissed with prejudice at plaintiffs' costs.

Dated this 19th day of May, 1981.

/s/ Clyde S. Cahill
United States District Judge

APPENDIX E

United States District Court
Eastern District Of Missouri
Eastern Division

Cause No. 81-0261-C (5)

Charles E. Sweeney, and
Adele Schenberg,
Plaintiffs,

and

Rory Riddler, Dorothy
Light, and Juanita Briggs,
Plaintiff-
Intervenors,

v.

Christopher S. (Kit) Bond,
Individually and as Governor
of the State of Missouri;
Ray S. James, Individually
and as Director of the Department of Revenue of
the State of Missouri;
Ernestine Beckman, and
Gerard J. Schmidt,
Defendants.

and

Ellie O'Donnell,
Denise Funderburk,
and Terry Cole,
Applicants
for
Intervention.

ORDER

Filed July 2, 1981

In accordance with the memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED that plaintiffs' motion for a new trial or to alter or amend the judgment is DENIED.

IT IS FURTHER ORDERED that the applicants' motion to intervene is DENIED.

IT IS FURTHER ORDERED that the plaintiffs' motion for an injunction pending appeal prohibiting their dismissal for partisan reasons is GRANTED.

IT IS FURTHER ORDERED that the plaintiffs post a three thousand dollar ($3,000) supersedeas bond for the security of the defendants' rights.

Dated this 2nd day of July, 1981.

/s/ Clyde S. Cahill
United States District Judge

MEMORANDUM

This matter is before the Court on various post-trial motions: the plaintiffs' motion for new trial or to alter or amend judgment, the applicants' motions to intervene, the plaintiffs' motion for an injunction pending appeal, and the defendants' motion for bond pending appeal.

Motion for New Trial
or to
Alter or Amend Judgment

The plaintiffs have filed a motion for a new trial or to alter or amend the judgment under Fed. R. Civ. P. 59.

A motion for a new trial or to alter or amend the judgment is addressed to the discretion of the trial judge. *Voegeli* v. *Lewis*, 568 F.2d 89, 94-95 (8th Cir. 1977). In ruling on such motions, the trial court must exercise its discretion to determine whether the judgment is supported by the law and the evidence presented. *See Lincoln Carpet Mills, Inc.* v. *Singer Co.*, 549 F.2d 80, 82 (8th Cir. 1977).

The Court finds that the judgment is supported by the evidence presented at trial and the holdings of *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980). Those cases prohibited the partisan dismissals of government employees. The holdings of *Elrod* and *Branti* were expressly limited to dismissals of *employees* and it was on that basis that the Court predicated its holding here. The evidence in this case showed that fee agents function in a capacity similar to that of independent contractors, and in the absence of restrictions commonly placed on employees. The Court engaged in a lengthy analysis of whether fee agents were "employees" of the state under Missouri law. *See* conclusions of Law 3 and 4. The Court remains convinced that fee agents do not satisfy the requirements for employee status under Missouri law. The testimony of Governor Bond would not have altered that result. The Governor's influence in the selection and appointment of fee agents, or even their employees, would not have persuaded the Court that fee agents were subject to management by the Governor to be considered state employees. Accordingly, the plaintiffs' motion under Rule 59 will be denied.

Application to Intervene

Applicants Ellie O'Donnell, Denise Funderburk, and Terry Cole have filed motions to intervene under Fed. R. Civ. P. 24. These applicants are persons chosen by the Director of Revenue to succeed three of the plaintiffs herein.

Under Rule 24, applications to intervene must be timely. *U. S.* v. *First Fidelity Bank of Colome,* 631 F.2d 568, 569 (8th Cir. 1980); *McClain* v. *Wagner Electric Corp.*, 550 F.2d 1115, 1120 (8th Cir. 1977). Whether an application is timely is within the discretion of the trial judge. *McClain; U.S.* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 115 (8th Cir. 1976). Timeliness must be evaluated in light of the material facts and circumstances of each case. *McClain; Nevilles* v. *E.E.O.C.*, 511 F.2d 303, 305 (8th Cir. 1975). Generally, applications for intervention made after the entry of final judgment will be granted only upon a strong showing of entitlement and justification for failure to request intervention sooner. *McClain; Associated Milk Producers* at 116.

The applicants have not demonstrated their entitlement to intervene here. First, none of these applicants was appointed before this litigation commenced and none of their appointments has become effective. These applicants have not assumed the duties of being fee agents and, as such, none is suffering a reduction of income. Second, the present defendants have adequately and competently represented the interests of the persons that the Bond administration wishes to appoint as fee agents, and the Court finds that no divergence of interest has occurred. Third, permitting the applicants to intervene at this late stage would disrupt the orderly processes of the Court. Judgment had been entered and postjudgment actions filed before these applicants sought intervention. At least one applicant, Terry Cole, knew of his prospective appointment as early as February, 1981. Intervention at this point would not promote the ultimate resolution of this litigation. Accordingly, the applications to intervene will be denied.

Injunction Pending Appeal

Plaintiffs have filed a motion for an injunction pending appeal under Fed. R. Civ. P. 62(c).

Rule 62(c) provides, in part:

> When an appeal is taken from . . . [a] final judgment . . . denying an injunction, the court in its discretion may suspend . . . [or] grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party . . . .

Generally, under Rule 62(c), the moving party must show: (1) a likelihood of prevailing on the merits on appeal; (2) irreparable injury to the moving party would result unless the injunction is granted; (3) no substantial harm to the other interested parties would result from the issuance of the injunction; and (4) issuance of the injunction would not harm the public interest. *Kansas City Royals Baseball Corporation* v. *Major League Baseball Players Association,* 409 F. Supp. 233, 263 (W.D.Mo. 1976); *see Belcher* v. *Birmingham Trust National Bank,* 395 F.2d 685, 686 (5th Cir. 1968); *Long* v. *Robinson,* 432 F.2d 977, 979 (4th Cir. 1970).

Clearly, any trial judge is reluctant to find that a substantial likelihood exists that he or she will be reversed. As a result, trial courts have issued or stayed injunctions pending appeal where such action was necessary to preserve the status quo or where the legal questions were substantial and matters of first impression. *See Mesabi Iron Co.* v. *Reserve Mining Co.,* 268 F.2d 782, 783 (8th Cir. 1959); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.,* 559 F.2d 841, 844 (D.C.Cir. 1977); *Parks* v. *"Mr. Ford",* 386 F. Supp. 1251, 1270 (E.D.Pa. 1975); *accord, North Central Truck Lines, Inc.* v. *U.S.,* 384 F. Supp. 1188, 1191 (W.D.Mo. 1974) (stay pending

appeal denied where action did not present new legal questions which might reflect on substantive correctness of injunctive order). The District of Columbia, the Second and the Ninth Circuits have adopted the approach that an injunction pending appeal is appropriate where serious legal questions are presented and the balance of hardships tips sharply toward the moving party. *Holiday Tours* at 844; *Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973); *Cortandi* v. *Aamco Automatic Transmissions, Inc.*, 456 F.2d 941, 943 (9th Cir. 1972); *see Evans* v. *Buchanan*, 435 F. Supp. 832, 843-44 (D.Del. 1977). These courts have recognized that under Rule 62(c), courts may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equitites of the case suggest that the status quo should be maintained. *Holiday Tours* at 844-45.

Under this standard, the Court finds that this case presents serious legal questions of first impression. No state or federal court has addressed the question whether *Elrod* v. *Burns* and *Branti* v. *Finkel* apply to persons other than employees. Only one court has considered the question of employee status under *Elrod* and *Branti*. *McMullan* v. *Thornburgh*, 508 F. Supp. 1044, 1046 (E.D.Pa. 1981). *McMullan* held that state Department of Health registrars were employees within the ambit of *Elrod* and *Branti*. Although this Court does not doubt the correctness of its own findings, it recognizes that the issues here present substantial and novel questions which are fair ground for litigation. Accordingly, the Court finds that the first criterion of Rule 62(c) is satisfied.

Denial of an injunction pending appeal would cause irreparable injury to the plaintiffs. In the absence of such an injunction, these plaintiffs undoubtedly will lose their fee agent offices. The loss of their appointments would force these plaintiffs to terminate their employees, office leases, and other com-

mitments. There would be no means for these plaintiffs to recoup interim fees should the plaintiffs prevail on appeal. Such fees would be paid to their successors, not to the State of Missouri. These considerations persuade the Court that irreparable injury to the plaintiffs would result if the injunction is denied.

On the other hand, these defendants and the persons appointed to be the successor fee agents would not suffer substantial harm from the issuance of an injunction. The State would continue to collect its revenues, fully and without interruption. Those persons appointed to be the successor fee agents, only two of whom are parties, would not suffer a reduction of any present income, nor would they be required to terminate their subordinates' employment. Any harm that would befall the defendants from the issuance of an injunction would be substantially less than harm to plaintiffs should the injunction be denied. The absence of substantial harm to the defendants favors the issuance of the injunction.

Last, the Court finds that the public interest would be served by the issuance of an injunction pending appeal. As stated above, the State would continue to receive its revenues. In addition, the public would be provided with the services of the fee agents without disruption. If the injunction were denied, and the judgment reversed on appeal, fee agent offices might be terminated, moved, and subsequently terminated and moved again, all to the public's detriment. A definitive ruling from the Court of Appeals before termination of the fee agent offices would be in the public interest. Of course, the Director of Revenue remains free to discharge any of these plaintiffs for cause during the pendency of the appeal.

The Court concludes that the plaintiffs have met the requirements of Rule 62(c) and that an injunction pending appeal is appropriate. This action presents novel and substantial legal

questions and the balance of the equities of the case requires that the status quo be maintained until the Court of Appeals decides otherwise. The Court further finds that a three thousand dollar ($3,000) cash bond is proper for the security of the defendants' rights.

SO ORDERED.

Dated this 2nd day of July, 1981.

/s/ Clyde S. Cahill
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 81-1815

Charles E. Sweeney, et al,
Appellants,

v.

Chrostopher S. (Kit) Bond, etc., et al,
Appellees.

No. 81-1816

Charles E. Sweeney, et al,
Appellees,

v.

Christopher S. (Kit) Bond, etc., et al
Ellie O'Donnell, et al,
Appellants.

No. 81-1817

Charles E. Sweeney, et al,
Appellees,

v.

Christopher S. (Kit) Bond, etc., et al
Ernestine Beckman, et al,
Appellants.

JUDGMENT

(Filed February 17, 1982)

Appeals from the United States District Court for the Eastern District of Missouri.

These cases were heard on designated record from the United States District Court for the Eastern District of Missouri and on briefs of the respective parties and were argued by counsel.

After consideration, it is now ordered and adjudged that the judgment of the said District Court in these causes be, and the same are hereby, affirmed in accordance with the opinion of this Court.

January 13, 1982

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit
2/16/82

APPENDIX G

Constitution Of United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

Title 42, United States Code

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX I

Revised Statutes Of Missouri

136.055. Agent to collect motor vehicle taxes and issue licenses—fees

1. Any person who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes under the provisions of section 144.440, RSMo, and who receives no salary from the department of revenue shall be authorized to collect from the party requiring such services additional fees as compensation in full and for all services rendered on the following basis:

(1) For each motor vehicle or trailer license sold, renewed or transferred—one dollar;

(2) For each application or transfer of title—one dollar;

(3) For each chauffeur's, operator's or driver's license—one dollar;

(4) No notary fee or other fee or additional charge shall be paid or collected.

2. This section shall not apply to agents appointed by the state director of revenue in any city where the department of revenue maintains an office.

Opposition

Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2046

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ADELE SCHENBERG, RORY RIDDLER, DOROTHY LIGHT and JUANITA BRIGGS,
Petitioners,

v.

CHRISTOPHER S. (KIT) BOND,
Individually and as Governor of the State of Missouri and
RAY S. JAMES,
Individually and as Director of the Department of Revenue of the State of Missouri,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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July, 1982

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I

QUESTIONS PRESENTED[1]

1. Whether *Elrod* v. *Burns*, 427 U.S. 347 (1976) and *Branti* v. *Finkel*, 445 U.S. 507 (1980) are applicable to the termination not only of public employees but also in independent contractors or franchisees.

2. Whether party affiliation is an appropriate requirement for the effective performance of the duties of Missouri Department of Revenue fee agents.

---

[1]The issues as stated herein are the precise issues determined by the lower courts. In postulating *their* issues, the petitioners have distorted the parameters of the actual controversy and attempted to introduce argument and prejudice into what should be a straightforward presentation of the legal issues subject to review.

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No. 81-2046

IN THE

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Individually and as Director of the Department of Revenue of the State of Missouri,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondents, Christopher S. Bond, Governor of the State of Missouri, and Ray S. James, Director of the Missouri Department of Revenue, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported as *Sweeney* v. *Bond*, 669 F.2d 542 (8th Cir. 1982) and affirmed the opinion and judgment of the United States District Court for the Eastern District of Missouri in *Sweeney* v. *Bond*, 519 F.Supp. 124 (E.D.Mo. 1981).

SUPPLEMENTAL STATEMENT OF THE CASE

1. *The Factual Record*

The STATEMENT OF THE CASE as included in the petition for writ of certiorari fails to include reference to much of the factual record which is relevant and germane to the determination by this Court as to whether certiorari should be granted in this case to review the judgment and opinion of the Eighth Circuit. This supplemental statement of the case is intended to address factual matters which may assist the Court in understanding and appreciating the legal conclusions reached by the trial and appellate courts. To avoid confusion, the parties will be referred to by their designations in the trial court, *i.e.*, as plaintiffs and defendants.

In November, 1976, Joseph Teasdale, a Democrat, was elected Governor of the State of Missouri. Governor Teasdale defeated the incumbent, Christopher S. Bond, a Republican. Governor Teasdale took office in January, 1977. In 1980, Governors Teasdale and Bond were again opponents in the gubernatorial election. In the election of November, 1980, Bond defeated Teasdale. Governor Bond again took office in January, 1981.

Missouri state law authorizes the Director of Revenue to appoint motor vehicle license agents who are authorized to issue license plates and permits, to transfer registrations, to issue or renew drivers' licenses and to accept applications for transfers of title. In each authorized transaction, state revenue would result. Fee agents are contracted to serve a multitude of localities within the State of Missouri. When defendant James became Director of Revenue in January, 1981, there were 158 such fee agencies, 21 of which were in the hands of civil organizations or municipalities.

All individual fee agents, 137 in number, were Democrats appointed by Democratic governors (Tr. 575).

Each of the plaintiffs is a long-time active participant in Democratic party politics who was appointed as a motor vehicle license agent in 1977, after Governor Teasdale assumed office, as a reward for his or her political activities. With the exception of plaintiff Schenberg, each of the plaintiffs succeeded a Republican. Plaintiff Schenberg succeeded a nonpartisan civic organization appointed during Governor Bond's first administration. All plaintiffs worked in the 1976 and 1980 gubernatorial campaigns of Governor Teasdale, and most contributed considerable time and money to those campaigns.

The evidence supporting the conclusions that plaintiffs were not public employees was extensive. The State of Missouri pays no compensation to fee agents (Tr. 520). The Department of Revenue does not withhold state and federal income taxes from the fees collected by fee agents (Tr. 520). The Department of Revenue does not make social security contributions on behalf of fee agents. Fee agents are not members of the Missouri State Retirement System (Tr. 521). The Department of Revenue does not submit the names of fee agents to be included in the official state manuals as employees of the Department of Revenue. All persons considered by the Department of Revenue to be employees are so submitted (Tr. 520). The Director of Revenue does not believe he creates an employment relationship when he appoints a fee agent, nor does he believe that the named plaintiffs are his employees (Tr. 521). Fee agents choose the offices of which they will serve the public, hire and fire their own employees, and determine the hours of the day and the days of the week when they are going to be open (Tr. 524). Fee agents are private business people who make their own internal management and policy decisions (Tr. 554).

There are additional indicia of the independent nature of fee agents. The Missouri Department of Revenue exercises no authority whatsoever over the employees of fee agents (Tr. 457). There is no state requirement with respect to the time a fee agent must devote personally to his or her fee agency duties. Many fee agents spend little or no time in their offices (Tr. 457-458). No fee agent has been told to close or not to close on state or federal holidays or to stay open or not to stay open on Saturdays (Tr. 459-460). It is not unusual for fee agencies to be located in the premises of other business enterprises. No fee agent has ever been instructed not to conduct a separate business enterprise (Tr. 460). No fee agent has ever been told where to locate his fee office, nor denied the right to move a fee office from one location to another (Tr. 451). The State does not have possession of keys to the offices of fee agents (Tr. 461). The State does not pay rent on the premises used by fee agents nor otherwise provide the physical space for any fee agent to carry out his or her duties (Tr. 463). The State does not purchase equipment necessary for the operation of fee agencies (Tr. 463). The State does not pay utilities or phone bills for fee agents (Tr. 463-464). In most instances, fee agents are themselves responsible for bad checks (Tr. 464). Fee agents are responsible for misplaced or lost inventory, including license plates (Tr. 464).

With respect to each transaction conducted by a fee agent, regardless of the amount of State revenue produced, the fee agent is authorized to charge a customer $1.00. These transactions service charges collected by fee agents are not deposited in State accounts (Tr. 466), and represent the gross incomes of fee agents. As long as fee agents accept proper applications, properly collect the amount of taxes and charges due the State and properly report to and pay money collected on behalf of the State, they are not

controlled with respect to the mechanism or details of their fee agent operations (Tr. 468).

The staff of the Commission of Social Security, based upon an extensive factual record, including legal citations and conclusions, recommended that Social Security contributions originally assessed by the State of Missouri be rescinded because motor vehicle license agents are not employees of the State (Defendants' Exhibit 3). The decision of the Commissioner of Social Security, dated September 29, 1980, found that fee agents are not employees of the State of Missouri under common-law rules (Defendants' Exhibit 4). The State of Missouri has taken the official position that fee agents are not employees of the State since 1953 (Defendants' Exhibit 2). The plaintiffs all paid self-employment taxes on the income from their fee agent operations (Tr. 170, 242). Fee agents are responsible for their own employees and must withhold the applicable state and federal taxes (Tr. 242).

There is little doubt that fee agency appointments have been a traditional patronage plum in the State of Missouri. That plum has been lucrative. For example, during calendar year 1980, plaintiff Schenberg made a net income from fee agency business of $39,000.00 Mrs. Light, $34,000.00, Mr. Riddler, $25,000.00 and Mrs. Briggs, $15 to $20,000.00 (Tr. 153, 241, 193, 220). Gross incomes were as high as $150,000.

Petitioners also omitted reference to facts which relate to the question of whether party affiliation is an appropriate requirement for the performance of fee agency duties. For example, plaintiff Briggs testified that her and her employees had considerable opportunity to meet, converse with, and transact business with people living in the Sikeston, Missouri area, and that it was fair to assume that the majority of those people were aware of her political

activities and those of her husband, who was appointed as a state trial judge during the administration of Governor Teasdale (Tr. 224, 231). Mr. Riddler conducted approximately 135,000 separate transactions with members of the public in and around St. Charles, Missouri during 1980 (Tr. 193). Because fee agents choose the offices in which they will serve the public, hire and fire their own employees, and determine the hours of the day and the days of the week they are going to be open, defendant James testified that the decisions made by fee agents reflect upon the Missouri Department of Revenue (Tr. 525), and to his belief that the people with whom he enters into voluntary contracts should be people whom he can work with and trust (Tr. 525).

In Missouri, motor vehicle license agents conduct approximately four and one-half million individual transactions with members of the public during each calendar year (Tr. 526-527). The fee agent is the front line and most frequent contact with the public for state government, and no other persons associated with the Department of Revenue have the same opportunity to meet with and do business with the public as do fee agents (Tr. 527). That is true not only with respect to the Missouri Department of Revenue, but with respect to State government as a whole, in that no representatives of State government, whether employees, contractors or franchisees, have nearly the same number of opportunities to meet and transact business with individual members of the public as do fee agents (Tr. 528). Defendant James testified that he believes the Department of Revenue is judged in part upon the job which motor vehicle license agents do (Tr. 528). The only control that he has over these individual contractors is the authority to appoint and terminate. Fee agents are private business people who make their own internal management policies (Tr. 545). Of these individuals having easily the most op-

portunity of all State representatives to meet and transact business with members of the public, at the time defendant James was appointed as Missouri Director of Revenue, all of these individual fee agents, 137 in number, were Democrats appointed by Democratic governors (Tr. 579). Of 158 total fee agents, 20 were nonpartisan civic organizations appointed by Governor Bond during his first administration and one was a municipality. From the allegations of the various complaints filed on behalf of plaintiffs, it is clear that each plaintiff presently feels free to and does continue to actively support and publicize his or her support of the Democratic party. All of the plaintiffs are intense political partisans, having contributed time or money or both to the Democratic Party and to the gubernatorial campaigns of Joseph Teasdale, a Democrat.

2. *The Decisions Reached by the Lower Courts*

The United States District Court for the Eastern District of Missouri concluded that fee agents are not employees of the State of Missouri, but are more in the nature of independent contractors or franchisees (Pet. A-23). We quote:

> "First, there is no requirement that fee agents actually *work* in their offices. Fee agents may select their employees and then delegate duties to them without DOR approval. Aside from accounting for the tax and license money collected, fee agents operate their offices with autonomy not generally accorded State employees. Fee agents supply, at their own expenses, office space and equipment, and pay salaries determined by the agents. Fee agents may, and frequently do, engage in other business endeavors. They may locate their fee agent office in commercial facilities. Agents are not paid by the State, but instead are statutorily authorized

> to charge the public for their services. Fee agents pay self-employment taxes. They are not members of the state retirement system. With the exception of plaintiff Sweeney, none of the others considered themselves state employees. The control exercise by the state is de minimis when compared to the degree of freedom afforded fee agents over the general operation of their offices." (Pet. A-23-24).

The District Court held that because fee agents are not State employees, they are not protected from dismissal because of their political affiliation. The District Court did not stop at that point, however.

> "While the Court expressly feels that plaintiffs are *not* employees, and therefore not shielded by *Elrod*, even had the Court determined them to be employed by the state, they still would not prevail, for *Branti* makes the comment that where 'party affiliation is an appropriate requirement for the effective performance of the office,' patronage dismissal may be allowed. [Citation omitted]." (Pet. A-25).

The trial court reached the following specific conclusions in making its judgment that party affiliation is an appropriate requirement for the effective performance of fee agency duty:

> "The fee agents have more than five million contacts with the public during their term and do serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.

First of all, there is little or no additional cost to the government, for the fees of the agents are simply added to the costs of the licenses and taxes, thus allowing the state the full and complete measure of its taxing bounty.

Second, any citizen wanting to avoid the agent's small fee can seek out a branch office or utilize the mails to pay the license fees and taxes without paying the $1.00 fee. He may have to forego the convenience of location or scheduled availability, but that would be a luxury that he could judge the value of and accept or decline.

Third, the requirements for filling the position of fee agent are simple and generic, no special skill or professional knowledge is needed, and thus large numbers of individuals could easily qualify for the posts with little difficulty in completing the work required.

Fourth, while not requiring the confidentiality and policymaking function of the top-level positions in state government, there is the responsibility of demonstrating loyalty, efficiency, and partisan pride, which could be interpreted as a hallmark of the incumbent administration.

Fifth, the fee holder can delegate practically all of the chores and responsibility of the office to others that he employs, and thus continue to actively and fully participate in the political activities of his choice without the restriction of a civil service code or the loss of services to the state, and

Sixth, the novel status of motor vehicle license fee agents supports the argument that the state interest in having such an unusual arrangement is an intentional and planned circumstance, designed to meet and

overcome the shortcomings of most patronage assignments.

In summary, then, the fee agents are extraordinarily suited for partisan, political appointment, and may well be a near perfect example of the kind of role suggested in *Branti*.

. . . .

And yet, these fee agents, although nonpolicymaking, nonconfidential employees, are still not protected from patronage discharge, because *Branti* provides that, for some positions, 'party affiliation is an appropriate requirement for the effective performance of the public office involved.' *Id.* at 518. Fee agents are uniquely suited for that requirement." (Pet. A-25-27).

The United States Court of Appeals for the Eighth Circuit affirmed the District Court in all particulars. The Eighth Circuit was reviewing not only a lower court opinion involving the four petitioners before this Court, but very similar opinions and judgments in two separate but indistinquishable cases decided by two additional district judges. All three district judges, who reached identical results, are on the United States District Court for the Eastern District of Missouri.[2]

The opinion of the Eighth Circuit can be accurately summarized by reference to one short quotation:

"Defendants assert that *Elrod* and *Branti* have no applicability to the terminations of fee agents be-

[2]The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri. Judge Cahill wrote the opinion and judgment which is included in the appendix to the petition for certiorari. His opinion related to all four petitioners before this Court. The two other judges who rendered decisions in accord with Judge Cahill were the Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri, and the Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

cause those cases addressed only the terminations of public employees and fee agents are not employees of the State of Missouri. Defendants further argue that even if the holdings in *Elrod* and *Branti* apply to the dismissal of fee agents, fee agents are not protected from termination because party affiliation is an appropriate requirement for the effective performance of the office. We agree with both of defendants argument." (Pet. A-6-7).

With respect to the party affiliation as an appropriate requirement issue, the Eighth Circuit stated as follows:

"Fee agents are not required to work in their offices. They are free to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in political activities free of the restrictions of the civil service code and without interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement for the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years." (Pet. A-9-10).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The decision of below is not in conflict with the applicable authority of this or any other federal court.

Both the District Court and the Circuit Court of Appeals reached two separate conclusions in rendering judgment in favor of the respondents herein. The lower courts found that *Elrod* v. *Burns*, 427 U.S. 347 (1976) and *Branti* v. *Finkel*, 445 U.S. 507 (1980), applied, on their face, only to the terminations of public employees and that, under the test provided by this Court in *Branti* v. *Finkel*, party affiliation is an appropriate requirement for the effective performance of the duties of appointed fee agents. With respect to both conclusions, there are no patronage cases from this or any other federal appellate court in conflict.

The record abundately and conclusively supported the conclusions of the trial and appellate courts that plaintiffs, as fee agents appointed under Missouri law, were not employees of the State of Missouri. Fee agents are independent business people appointed by the State with authority to issue certain licenses and collect certain taxes respecting the operation of motor vehicles within the State of Missouri. These agents are independent contractors or franchisees who can best be analogized to manufacturers' representatives. They do not represent the classic case of an independent contractor selected to perform a specific construction project or to sell supplies to the State. Rather, fee agents perform a service for the State much as the purveyors of hunting and fishing licenses, the providers of vehicle safety inspections, notary publics, or hot dog venders at the Missouri State Fair provide services as franchisees. The respondents do not interpret the petition as seriously challenging the inescapable conclusion of the lower courts that

no employment relationship exists between fee agents and the State of Missouri.

Clearly, given the unique and independent nature of fee agents, *Elrod* v. *Burns*, *supra* and *Branti* v. *Finkel*, do not apply to, nor are they in conflict with, the opinions of the lower courts in this matter. The following issue was presented to this Court in *Elrod* v. *Burns*, 427 U.S. 347, 349:

> "This case presents the question whether *public employees* who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." (Emphasis added)

The plurality opinion of the United States Supreme Court in *Elrod* v. *Burns*, written by Justice Brennan and joined in by Justices White and Marshall, was very carefully restricted to the constitutionality of dismissing public employees for partisan reasons. We quote:

> "The Cook County Sheriff's practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage. The practice also includes placing loyal supporters in government jobs that may or may not have been made available by political discharges. Nonofficeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies. Favored wards may receive improved public services. Members of the judiciary may even engage in the practice through the appointment of receiverships, trusteeships, and refereeships. Although policial patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." 427 U.S. at 352.

Because the plurality opinion of the Supreme Court in *Elrod* v. *Burns* was joined in by only three of the eight justices sitting on the case, it is also instructive to look to the opinin of the two concurring judges. Justices Stewart and Blackmun framed the issue as follows:

> "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. . . ." *Id.* 427 U.S. at 375.

Branti v. *Finkel* did not extend the *Elrod* Doctrine beyond the termination of public employees. The issue in that case was:

> "[W]hether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs." *Branti* v. *Finkel, supra* 445 U.S. at 508.

There was no dispute in *Branti* about the public employment status of the plaintiffs.

As in *Elrod*, the only issue in *Branti* related to the dismissal of public employees for partisan reasons. We quote from footnote 7 of the *Branti* opinion:

> "Mr. Justice Brennon [in *Elrod*] noted that many other practices are included in the definition of a patronage system, including placing supporters in government jobs not made available by political discharges, granting supporters lucrative government contracts, and giving favored awards and improved public services. In that case, as in this, however, the only practice at issue was the dismissal of public em-

ployees for partisan reasons [citations omitted]. In light of the limited nature of the question presented, we have no occasion to address petitioner's argument that there is a compelling governmental issue in maintaining a political sponsorship system for filling vacancies in the public defender's office." *Id.*, 445 U.S. at 513 n.7.

There is no case law which supports the proposition that *Elrod* v. *Burns* and its progeny may be applied to the termination of the agency of contractural relationships of independent contractors or franchisees. In a similar case, the Eastern District of Pennsylvania did determine that the existence or nonexistence of a public employee status was a crucial prerequisite to the application of *Elrod* and *Branti*. In *McMullan* v. *Thornburg*, 508 F.Supp. 1044 (E.D. Pa. 1981), a detailed examination was made to determine whether an employment relationship existed between the plaintiffs and the defendants.

Obviously, the decisions of the lower courts in this case do not stand in conflict with the established precedent of this or any other federal court concerning the public employment issue. Certiorari should not be granted to review what is clearly a local dispute involving the unique status of fee agents under Missouri law, a status so unique that it is not likely to be repeated within any other jurisdiction.

Similarly, with respect to the conclusions of the trial and appellate courts in this matter that party affiliation is an appropriate requirement for the functions performed by fee agents, no conflict exists between the decisions of the lower courts and the applicable precedent of any other federal tribunal. The following test has been propounded by this Court:

"In sum, the ultimate inquiry is not whether the label 'policy maker'; or 'confidential' fits a particular po-

> sition; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti* v. *Finkel, supra,* 445 U.S. at 518.

The lower courts applied that test in this case. Contrary to the assertions made by the petitioners at page 26 of the petition, the lower federal courts have not interpreted and applied the *Branti* test in such a way as to conflict with the decisions below. Further, the District Court and the Eighth Circuit rationally applied the political affiliation test:

> "The district court held that party affiliation was an appropriate requirement for the position of fee agent because fee agents
>
> > serve as selected emaissaries of the incumbent administration and thus reflect is concern for courtesy, efficiency, and integrity. Unlike civil servants who remain during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.
>
> *Sweeney* v. *Bond, supra,* 519 F.Supp. at 129.

Fee agents are not required to work in their offices. They are free to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in political activities free of the restrictions of a civil service code and without interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of

which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement for the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years." (Pet. A-9-10).

We again remind the Court of the unique nature of Missouri motor vehicle license fee agents. These agents are an anomaly of Missouri law and practice not likely to be duplicated in other states. It would serve little purpose for this Court to analyze in depth the question of whether party affiliation is an appropriate requirement for the performance of fee agency duties, because such analysis would have little if any applicability to other factual situations which may arise in the future and would, therefore, have little general precedential value.

II.

Given the restricted precedential value of Supreme Court review of this case, the grant of certiorari is unwarranted.

The decisions of the lower courts in this case turned upon facts which are unique to an unusual anomaly of Missouri law and practice, the motor vehicle license fee agent. Supreme Court review would effect only the litigants and other Missouri fee agents. Not only are the decisions below correct, which in and of itself should lead to the denial of the petition, and not in conflict with other applicable federal precedent, but the factual situation

upon which the decisions of the lower courts turned are sufficiently specific only to the litigants so as to render further review of limited precedential value.

The decisions below represent the independent conclusions of three separate district judges and a unanimous panel of three appeals court judges. Six federal judges have now agreed. Their conclusions support the position of the respondents herein.

Elrod v. *Burns* and its progeny have created a de-facto civil service for public employees. This civil service system imposed upon the State of Missouri with respect to its relationship to its employees bears no relationship to the independent decision-making processes of the Missouri Legislature which has itself designated those public employment positions which should be covered by a merit system. Missouri had extended merit system protections to the majority of its public employees before *Elrod*. That this imposition upon the traditional authority of the states to determine which public employment positions are to be protected in the nature of a civil service system is contrary to the historic realities of political life in the states as amply demonstrated by the dissenting opinions of Justice Powell in *Elrod* and *Branti*. *Elrod* v. *Burns*, 427 U.S. at 376-389; *Branti* v. *Finkel*, 445 U.S. at 521-534. This Court should look with disfavor at the prospect of granting certiorari in a case in which the petitioners are seeking an extension of the *Elrod* Doctrine into the area of state franchisees. This is especially true because the decisions below turn upon their own facts.

There have been fee agents in Missouri since approximately 1950. Traditionally, these agents have been looked upon as grass-roots representatives of the incumbent administration. When the defendants assumed office in January, 1981, each of 137 individual fee agents

appointed to localities throughout the State of Missouri was a highly partisan Democrat. Because each of these fee agents was able to hire employees completely outside the control of the Missouri Department of Revenue and because most of these fee agents have traditionally been engaged in separate and distinct business enterprises, each was free to devote considerable time in the support of partisan party politics. This structure providing local political representatives at the grass roots cost the State nothing because fee agents are compensated solely by means of collecting transaction service charges from their customers. It must be remembered that plaintiffs are independent business people having been franchised with authority to transact certain specific types of revenue producing business for the State. Fee agents perform four and one-half million transactions with citizens of the State each year. As individual contractors or private business people, the plaintiffs, and motor vehicle license agents generally, operate free of the restraints normally imposed upon government employees. These individuals are not subjected to the daily supervision of executive policymakers. As long as they account to the State for its property and revenue collected, plaintiffs are not subjected to State government supervision over their day-to-day activities or the manner and means in which they interact with the public. The only control which defendants can assert over fee agents to ensure their loyalty, integrity and efficiency is to appoint people known to be dependable in those respects.

The existence of fee agents is a phenomenon unique to the State of Missouri. Because of the unique nature of fee agents, none of the disadvantages of patronage discussed by this Court in *Elrod* v. *Burns* and *Branti* v. *Finkel* are presented by the factual situation now before the Court. The District Court rationally concluded (1)

that fee agents require little or no additional cost to government; (2) citizens have the option not to use the services of fee agents; (3) the skills required of fee agents are simple allowing large numbers of individuals to easily qualify to be fee agents; (4) that the position of fee agent requires a demonstration of loyalty, efficiency, and partisan pride, which can be interpreted as the hallmark of the incumbent administration; (5) that fee agents can delegate practically all of their chores and responsibilities to employees, and thereby continue to actively and fully participate in the political activities of his or her choice without the restriction of a civil service code or the loss of services to the State and (6) that the "novel status of motor vehicle license fee agents supports the argument that the state interest in having such an unusual arrangement is an intentional and planned circumstance, designed to meet and overcome the shortcomings of most patronage assignments." (Pet A-25-26). The Eighth Circuit adopted most of the foregoing conclusions of the District Court and concluded even more succinctly:

> "Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement for the effective performance of fee agents and has been so regarded by both Democrats and Republicans or many years." (Pet. A-10).

We submit that the decisions of the lower courts are logical and correct. There are no patronage disadvantages to the appointment of fee agents by an incumbent governor and his director of revenue. Because of the unique and unusual status of fee agents in the State of Missouri, this

Court should deny certiorari because the factual situation herein involved would not be so generally applicable as to provide a sound basis for generalized legal precedent. The very uniqueness of the factual situation in this case precludes review by this Court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-2046

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ADELE SCHENBERG, RORY RIDDLER,
DOROTHY LIGHT and JUANITA BRIGGS,
Petitioners,

vs.

CHRISTOPHER S. (KIT) BOND,
Individually and as Governor of the State of Missouri

and

RAY S. JAMES,
Individually and as Director of the Department
of Revenue of the State of Missouri,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

Throughout respondents' brief in opposition, they argue that fee agents in Missouri are unique, and therefore this Court should deny certiorari because the issues are not of general concern. For example, respondents state (page 15) that "certiorari should not be granted to review what is clearly a local dispute involving the unique status of fee agents under Missouri law, a status so unique that it is not likely to be repeated within any other jurisdiction." Similar statements as to uniqueness are repeated on pages 17, 18, 19, 20 and 21 of the brief in opposition.

Respondents are wrong - Missouri is not the only state which has a fee agent system for issuance of motor vehicle licenses and drivers registration. Although the persons may not be called fee agents in other jurisdictions, many states do provide for similar operations. The following is a representative, but not complete, list of statutory authority[1] in states which have comparable license offices:

Illinois (Chap. 95-1/2, § 2-122, § 3-900 et seq.) — the Secretary of State may appoint "remittance agents" upon application, who apparently charge for each transaction.

Indiana (§9-1-4-2 et seq.) — branch offices may be established by the commissioner and the branch office may retain a "service charge" (§ 9-1-4-2) and a "branch fee" (§ 9-1-4-43).

Maine (Chap. 29, §§ 52 and 52-A) — the Secretary of State may appoint agents, municipal tax collectors "or such other persons as the municipality may designate", and the municipal agents may charge a fee of $1.00 or $2.00.

Minnesota (§§ 168.33 and 171.06) — the commissioner of public safety, as registrar of motor vehicles, appoints deputy registrars who are entitled to retain a filing fee in lieu of a salary and are considered as independent contractors; the clerk of the district court may retain a fee for drivers licenses and may appoint agents to assist and share the fees.

Nevada (§§ 481.051 and 482.155 et seq.) — the director may appoint vendors to serve as department agents on a fee basis, and may establish branch offices or may by contract appoint any person as an agent to be paid on a fee basis.

New Jersey (§§ 39:3-3 and 39:10-25) — the director may appoint agents who are paid through the state treasurer on a fee basis. See also Brief Amicus Curiae filed in this case by the New Jersey Motor Vehicle Agents Association.

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[1] All references are to statutes of the particular state mentioned.

New Mexico (§ 66-2-14 et seq.) — the director may appoint agents who are compensated by the agents' administrative service fees, which are sent to the division and then remitted to the agents.

New York (Title 2, Art. 2, §§ 205 and 206) — certain public officials act as agents of the commissioner and may in turn delegate their duties; such agents are compensated on a fee basis. In addition, the commissioner may deputize any person, not paid by the state, but compensated on a fee basis. "The Commissioner may, without a hearing, revoke at any time the authority granted to any person under this section."

Ohio (§§ 4503.03, 4503.10, 4507.01, 4507.24, 4519.03) — the registrar may designate a county auditor and shall contract with other persons to act as deputy registrars, to be located "as the registrar sees fit". The deputy registrar receives a fee for each transaction to compensate him for his services and overhead expenses.

Oklahoma (Title 47, § 22.22-1) — the Commission appoints agents, compensated on a fee basis, with the advice and consent of the Senate; the agents shall be "self-employed independent contractors. . .removable at the will of the Commission."

Oregon (§ 481.105) — the division may designate certain officials "or other persons"; the other persons retain the prescribed fee as compensation for services.

Virginia (§ 46.1-28 et seq.) — the Commissioner may maintain branch offices or appoint agents; the personnel are appointed by the Commissioner. Agents are compensated on a percentage basis to cover services, employees, and overhead.

Washington (§§ 46.01.130 and 46.01.140) — the director may appoint county auditors or other agents who are compensated on a fee basis.

These statutes and others reveal that the Missouri fee agent system is not unique. It is representative of licensing systems which exist in many states and would be directly affected by a decision in the instant case.

Furthermore, the issues in this case are not limited to motor vehicle registration offices. Any person subject to appointment or continuation in office under the control of partisan officials will be affected by a decision in this case. Consider the impact upon the notary public, government licensed liquor dealers, state lottery sales agents, and even "hot dog venders at the Missouri State Fair",[3] all of whom are susceptible to inclusion within the "general practice of political patronage" recognized by this Court in *Elrod* v. *Burns*, 427 U.S. 347, 353 (1976).

Far from being unique, this case involves issues of concern to anyone affiliated with any level of government throughout this country. For this reason, certiorari should be granted.

Respectfully submitted,

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[3] Are respondents suggesting, on page 12 of their brief in opposition, that Republicans make better hot dogs than Democrats?

Amicus Brief

In The

Supreme Court Of The United States

DOCKET NO. 81-2046

OCTOBER TERM, 1981

ADELE SCHENBERG, RORY RIDDLER, DOROTHY LIGHT & JUANITA BRIGGS,
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CHRISTOPHER S. (KIT) BOND,
Individually and as
Governor of the State of Missouri
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Department of Revenue of the
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Respondents.

On Writ of Certiorari To the United States Court of Appeals for the Eighth Circuit

NEW JERSEY MOTOR VEHICLE AGENTS ASSOCIATION OF AMICUS CURIAE BRIEF

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STATEMENT OF REASON TO FILE BRIEF AMICUS CURIAE

The New Jersey Motor Vehicle Agents Association, the organization on whose behalf this Amicus Curiae Brief was filed, is an organization comprised of the Motor Vehicle Agents in the State of New Jersey. These agents are selected and compensated in a manner virtually identical to that of the Revenue Agents in the within matter. Due to a change in the Administration of the State of New Jersey in January of 1982, it appears likely that all or most of the Motor Vehicle Agents will be replaced because of their political affiliations. This conclusion is based upon the fact that several high ranking members of the new Administration have made public statements to that effect and all Motor Vehicle Agents have recently received "Application for Employment" implying that the position they currently hold is to become vacant. The Association therefore, is vitally interested in the results of this litigation.

The Appellants have consented to the filing of this brief. The Respondents did not file an answering brief or otherwise respond, however, they have been requested to do so by this court no later than July 19, 1982.

QUESTIONS PRESENTED

1. Whether the principals of *Elrod vs Burns 427 U.S. 347 (1976)* and *Branti vs Finkel 445 U.S. 507 (1980)* apply to protect government agents who receive their compensation from the State as a percentage of fees recovered rather than straight salary.

2. Whether political affiliation is an appropriate requirement for the effective performance of the duties of government fee agents whose duties are non confidential and non policy making.

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TABLE OF AUTHORITIES

Cases

Branti v. Finkel, 445 U.S. 507 (1980)
Elrod v. Burns, 427 U.S. 347 (1976)
Lefkowitz v. Turley, 414 U.S. 70 (1973)
McMullan v. Thornburgh, 508 F. Supp. 1044 (E.D. Pa. 1981)

Other Authorities

U.S. Constitution, First Amendment

OPINION BELOW

This case was decided by a panel of the United States Court of Appeal for the Eighth Circuit on January 13, 1982. The opinion was reported in *Sweeny* v. *Bond*, 669 F2d 542 (8th Cir. 1982). The panel consisted of Circuit Judges Ross and Stephenson and District Judge Howard of the Western District of Arkansas, sitting by designation.

JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED and STATEMENT OF THE CASE

With reference to the aforementioned, I would adopt by reference those items recited in the petition for Writ of Certiorari submitted by Irl B. Baris, counsel of record for the petitioners.

ARGUMENT
Introduction

The basis for the desire of the New Jersey Motor Vehicle Agents Association to file a Brief Amicus Curiae is to assert arguments that could not be asserted by the petitioners in the within matter, specifically that the scope of issues presented here would affect individuals other than agents in the State of Missouri. For all practical purposes, New Jersey Motor Vehicle Agents perform a function essentially identical to Missouri Fee Agents and the method of compensation is in almost all respects identical. In addition, as of January, 1982 control of the New Jersey State House changed political parties due to the election of a new Governor and the new Administration has evidenced its intention to replace Motor Vehicle Agents based upon political considerations. Accordingly, if the Court were to grant the petitions for Certiorari it would provide the Motor Vehicle Agents as well as the State the necessary guidelines required to determine the applicability of *Elrod vs Burns 427 U.S. 347 (1976)* and *Branti vs Finkel 445 U.S. 507 (1980).*

Since the Court has left unsettled an area of public "Employment" that affects many individuals, it is respectfully urged that the Court grant the petition for Certiorari and thereafter decide the case in accord with principles previously laid down in *Elrod* and *Branti.*

POINT A

The distinction of whether or not Missour Fee Agents are public employees or non-employees is not a relevant consideration under *Elrod* and *Branti.*

The Court of Appeals took great pains to draw a distinction between Missouri Fee Agents and other Missouri public employees. It then concluded that the State could take action against those Fee Agents based upon their political affiliation because they were not "Employees" in the traditional sense. The Court never addressed the question of whether or not there was nontheless a blatant violation of First Amendments rights. The fact remains that the Fee Agents are performing a function exclusively for the State. They neither set policy nor enjoy any type of confidential relationship with the Governor or appointing authority. They have been fired for reasons relating to their political beliefs and affiliations which belief and affiliations in no way are a necessary ingrediant to the performance of their duties. (It is inconceivable that one must be a Democrat or a Republican to issue a drivers license.)

The point in question is not the technical status of the individual Fee Agents but rather the constitutional permissability of the actions taken against them based upon their political beliefs and affiliations. While the *Branti* and *Elrod* cases happen to involve "Employees" in a more traditional sense, there is nothing in either opinion which expressly limits the First Amendments privileges to only employees of this nature. In the most general sense, Missouri Fee Agents work for the State and are compensated for their efforts and therefore the constitutional protections afforded regular employees should be afforded them as well.

Notwithstanding their status as "Non-employees" in the eyes of the Court of Appeals, I am sure that anyone would agree that if a Fee Agent had made a speech critical of the current Governor's performance in office and was fired for

making that speech, that would be deemed to be an unconstitutional infringment upon the agents First Amendments rights. In essense that is what we have here although many agents are involved and their "Crime" is that they affiliated with the wrong political party and did not support the current Governor.

In summation, it is clear that the status of the Fee Agents as "Employees" or "Non-employees" is totally irrevelant. They are being fired from their positions because of their political beliefs and affiliations and this is a violation of the First Amendment to the United States Constitution. *Lefkowitz vs Turley 414 U.S. 70 (1973).*

POINT B

Political affiliation is not an essential element to the performance of a Fee Agents function.

Branti vs Finkel 445 U.S. 507 (1980) recognizes that an employee can be discharged for political reasons if the employee's job was one which required political affiliation for its proper operation. An excellent example of this would be an election board worker. Such an individual would have to be a member of a particular political party so as to insure equal representation of both parties on the election board as required by statute. The Court below, in applying the same exception to the Missouri Fee Agents, clearly misread *Branti* and is attempting to place the Fee Agents into a catagory which simply does not apply.

The function of a Fee Agent is almost classicly ministerial. They do not set fees, guidelines or policies. They simply collect money from the public and issue drivers licenses. There is absolutely nothing discretionary about their function and their operations are monitored and approved by the State. To say that whether you are a Democrat or a Republican will effect how you perform this function is to deal in pure fantasy. If that were the case, then it must logically follow that an Independent, that is one who is not affiliated with either the Democrat or Republican parties, could not perform this function at all.

The exception outlined in *Branti* for political affiliation clearly involves situations where the job simply could not be performed in an effective manner by anyone other than a member of a certain political party. That is not the case here and it is respectfully urged that this Court should so decide.

POINT C

This Court should grant the petition for Certiorari so as to clarify the status of the law in this area in light of conflicting decisions by the lower Courts.

As stated previously, the New Jersey Motor Vehicle Agents, in terms of their function, status and compensation precedure are virtually identical to the Missouri Fee Agents. The one distinction is that New Jersey Motor Vehicle Agents are given a W-2 form at the end of the year by the State of New Jersey. Despite the ruling by the Eighth Circuit which the subject of this petition, the trial court case of *McMullan vs Thornburgh 508 F.Supp. 1044* is also strongly analogous to the New Jersey Motor Vehicle Agents situation and reaches a contrary result. Since this decision comes within the Third Circuit, it is of special note to us.

It is quite likely that if the Court grants the petition for Certiorari both parties in the New Jersey Motor Vehicle Agents case will withhold further action until the Court makes a definative ruling on the subject. If the Court denies the petition for Certiorari, it is a virtualy certainty that the matter will result in litigation and may well result in conflicting decisions between the Third and Eighth Circuits. In any event, most of these lower Court decisions appear to be attempting to carve out factual exceptions while ignoring the basic underlying constitutional questions. This places the trial Courts in the bizarre position of condemning "Pork Barrel" patronage practices as unconstitutional in certain instances and condoning the same practice in other instances.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Eighth Circuit.

Respectfully submitted,